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WILCOX & CO.

No. 3824.

United States Circuit Court of Appeals

For the Ninth Circuit.

1310 ——— 1311

CENTRAL CALIFORNIA CANNERIES COMPANY,
Appellant,
vs.
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

GRIFFIN & SKELLEY COMPANY,
Appellant,
vs.
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

J. C. AINSLEY PACKING COMPANY,
Appellant,
vs.
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

ANDERSON-BARNGROVER MANUFACTURING COMPANY,
Appellant,
vs.
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

GOLDEN GATE PACKING COMPANY,
Appellant,
vs.
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

J. F. PYLE & SON, INC.,
Appellant,
vs.
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

HUNT BROTHERS COMPANY,
Appellant,
vs.
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

SUNLIT FRUIT COMPANY,
Appellant,
vs.
DUNKLEY COMPANY (Now Known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

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APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

The appeals in these eight cases are to be heard upon one and the same record, by stipulation of the parties. The appeals are from the order of the United States District Court for the Northern District of California, entered August 22, 1921, granting the motion to add new party plaintiff, without setting aside or vacating the interlocutory decrees in said causes, or vacating or setting aside the injunctions.

STATEMENT OF FACTS.

The bills of complaint were filed in August, 1916, by the then sole plaintiff, — Dunkley Company, — a Michigan corporation having its principal place of business at Kalamazoo, Michigan.

The bills of complaint allege the grant to such Dunkley Company of the patent in suit, No. 1,104,175, on July 21, 1914, and that "ever since the issuance of said letters patent plaintiff has been and still is the sole owner and holder thereof and of all the rights thereby granted."

Defendants duly severally answered and the cases came on for trial on March 24, 1916, at San Francisco before the Honorable William C. Van Fleet, United States District Judge. After the testimony of witnesses had been offered upon behalf of the respective parties and the cause argued by counsel, an order was entered submitting the cause for determination. [Trans. Rec. p. 2.] This order of submission was made *April 5, 1916.* By the terms of the order the respective parties were allowed time within which to file briefs.

Thereafter, — on *December 4, 1916* — His Honor Judge Van Fleet, rendered an oral opinion finding the patent valid and infringed.

On *December 8 1916,* interlocutory decrees were entered finding the patent in suit valid, *the plaintiff the owner thereof,* and the several defendants infringers thereof. An injunction was decreed, together with a reference to a master to take and state an account of profits and damages.

Within the statutory period defendants perfected appeals from the decrees awarding such injunction. These appeals were heard in this court as one cause No. 2915 and were duly argued in this court at the May, 1917, term thereof. The transcript of record on appeal in such case is by stipulation made a part of the transcript of record on these appeals. [Trans. Rec. pp. 389-390.]

On *October 1, 1917,* this court rendered its opinion disallowing said appeals and affirming said interlocutory decrees (Central California Canneries Company v. Dunkley Company, 247 Fed. 790), and on said date entered its decrees of affirmance. A petition for rehearing was denied. A petition to the Supreme Court for certiorari was denied on *December 17, 1917.*

Through oversight the mandates of this court were not filed in the District Court until *May 22, 1918.*

During all of this time and through all of these recited proceedings and steps, each of these suits was prosecuted by said Dunkley Company as sole plaintiff under the original allegations of the bills of complaint

that it was the sole owner and holder of said letters patent and of all rights thereunder.

On *December 25, 1915,* this same Dunkley Company filed a bill of complaint against Pasadena Canning Company. This bill was filed at Los Angeles in the United States District Court for the Southern District of California. The defendant therein filed its answer on January 6, 1916.

By due proceedings had in accord with the laws of the state of Michigan on *January 27, 1916,* the name of the Dunkley Company (the original plaintiff), was changed to *Michigan Canning & Machinery Company.* [Trans. Rec. p. 3.] On this same date,—*January 27, 1916,*—there was duly organized under the laws of the state of Michigan a new, separate and distinct corporation but named *Dunkley Company.* [Trans. Rec. p. 3.]

The suit by Michigan Canning & Machinery Company (named in the bill of complaint Dunkley Company) against Pasadena Canning Company was not brought to trial until in 1918. The actual court trial commenced on *May 12, 1918.*

Prior thereto and on *April 11, 1918,* plaintiff filed a motion to dismiss said suit and accompanied said motion with the affidavits of S. J. Dunkley and John H. Miller (one of its counsel). Attached was a purported copy of an assignment dated *May 25, 1916,* executed by Michigan Canning & Machinery Company and granting to Dunkley Company (the new 1916 corporation): "the whole right, title and interest in and

to said improvement in machines for peeling peaches and other fruit, and in and to the letters patent therefor aforesaid; the same to be held and enjoyed by the said Dunkley Company for its own use and behoof and for the use and behoof of its legal successors and assigns to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by it had this assignment and sale not been made."

Upon the filing of this motion to dismiss at Los Angeles in the Pasadena Canning Company case, defendants' counsel for the first time received an intimation that there had been an assignment of said patent by the original company. Relying upon the information thus given by the motion to dismiss, counsel for these defendants having ascertained that the mandates of this court in these suits (No. 2915 herein) had not actually been transmitted from the office of the clerk to the United States District Court for the Northern District of California, made a motion in this court for orders vacating the decrees affirming the decrees of the District Court, etc. This motion was filed in this court on *April 19, 1918.* (By stipulation the notice of motion and moving papers are made a part of the transcript of record on this appeal. Said papers were printed for the convenience of the court.) The sole showing on behalf of defendants in regard to said assignment was a certified copy of said motion to dismiss including therein the copy of said assignment

and of the articles of incorporation of the 1916 Dunkley Company and of the original plaintiff,—Dunkley Company,—and of the change of the name thereof on January 27, 1916, to Michigan Canning & Machinery Company.

At the hearing of this motion in this court, plaintiff's counsel represented to this court that this assignment of July 25, 1916, did not pass the entire title to the patent in suit to the new 1916 Dunkley Company.

Upon this *ex parte* showing, on behalf of defendants, *thus disputed by plaintiff,* this court denied defendants' motion to vacate this court's decree of affirmance, but properly reserved the whole matter for the determination of the District Court.

This court rendered no opinion or statement of its conclusions on this motion. Your Honors evidently took the view (and we believe properly), that as the facts and circumstances of assignment of the patent and its effect and the right of the original plaintiff to maintain these suits was *in dispute,* such disputed questions should be determined in the first instance in the trial court (the District Court) and not in this Appellate Court.

Your Honors on May 20, 1918, denied appellants' motion *but reserved the question for the original determination of and by the District Court* by adding to the mandates of this court the following reservation:

> "without prejudice to the right of the plaintiff-appellee herein to apply to the District Court for leave to make the Dunkley Company, or such other corporations or persons, as plaintiffs-appellees may contend is or are proper or necessary party plaintiffs to the action."

The motion to dismiss the Pasadena Canning Company case was denied. Thereupon in that case a supplemental bill was filed, defendant therein consenting thereto. Such supplemental bill made the new 1916 Dunkley Company a party plaintiff, also brought into the suit a process patent which had issued and also brought in George E. Grier as a party defendant. Defendants in that case answered the supplemental bill and on *May 12, 1918,* the trial of this Pasadena Canning Company case commenced before His Honor Judge Oscar A. Trippet.

The result of such trial was a decision by Judge Trippet that both of the Dunkley patents were void.

From the decree dismissing such Pasadena Canning Company suit plaintiffs appealed to this court. This appeal was heard and determined by this court on *October 29, 1919,* Dunkley Company v. Pasadena Canning Company, 261 Fed. 386. Plaintiffs petitioned for a rehearing, basing such petition particularly upon the ground that the opinion of the court did not discuss and decide all of the issues of the case. The issue in particular not discussed in the opinion was the validity of the patents. The issues of infringement in the case were the use by the Pasadena Canning Com-

pany of the *original Grier machine* and the use of the so-called "Pasadena Washer." These were two different forms of machines. Infringement by the Grier machine was conceded but it had been proven in the District Court and was adjudicated by Judge Trippet that George E. Grier invented such machine prior to the Dunkley invention. After the petition for rehearing had been denied by this court, an oral motion was made by the appellants and the matter of a rehearing was orally argued. On the submission of this argument this court, speaking through His Honor Circuit Judge Gilbert, said:

> "It occurs to the court that the only question here is whether or not a sentence in the opinion of this court should be corrected or modified, and that matter will be sent to the judge who wrote the opinion of this court on the merits of the case. *We were very firmly of the opinion that the decision of the court below should be affirmed.* The present motion will be denied. It is possible that the sentence in the opinion referred to may be corrected." (Italics supplied.)

The petition for certiorari to the Supreme Court of the United States was denied April 26, 1920.

On April 12, 1918, the 1916 Dunkley Company filed a bill of complaint against the California Packing Corporation in the United States District Court for the Southern District of California, alleging infringement by defendant of the Dunkley patent here in suit and of the Dunkley process patent. That bill of complaint

was signed by Mr. Fred. L. Chappell as counsel for plaintiff and verified by the affidavit of Mr. Dunkley. Mr. Chappell is shown by the record in these litigations to have been the attorney for the Dunkleys and Dunkley Companies since 1910 and in personal charge of all these matters. In this California Packing Corporation bill of complaint, the 1916 Dunkley Company alleged:

"VII. That by suitable instruments in writing the plaintiff herein has acquired the entire right, title and interest in and to the said letters patent No. 1,104,175 and 1,237,623, together with all rights to action and claims for damages, profits and costs, either at law or in equity against all persons, firms, or corporations by reason of any unlawful use of said inventions or infringement or any of the rights and privileges secured or intended to be secured by said two letters patent; wherefore, the plaintiff has been and now is the sole and exclusive owner of said inventions and letters patent and of all rights thereunder as by said original instruments in writing (duly recorded in the Patent Office of the United States) in court to be produced will more fully appear."

It is thus seen that in April, 1918, this 1916 Dunkley Company was asserting and Mr. Chappell, its attorney, was construing the entire title to these Dunkley patents to be in the 1916 Dunkley Company and that the old Michigan Canning & Machinery Company had no right, title or interest therein whatsoever.

On *October 14, 1918,* there was filed in these cases in the United States District Court for the Northern

District of California, the motion which resulted in the orders to be reviewed on these appeals. This motion appears in the transcript of record, pages 2-9.

The motion is made by plaintiff, *i. e.,* Michigan Canning & Machinery Company, formerly known as Dunkley Company. The prayer of the motion is that "the said new Dunkley Company may be made party plaintiff herein, as it is the chief party in interest and is this plaintiff after reincorporation with increased capital stock."

Appended to such motion is a prayer by the new Dunkley Company that "it may be made a party plaintiff herein and that it may be substituted in the place of the Dunkley Company herein." The motion is based upon an alleged assignment dated *July 9, 1918.*

If it be assumed for the purposes of argument that the title was on July 9, 1918, in this new Dunkley Company as asserted in this motion, then the new Dunkley Company was the only proper party plaintiff and the old plaintiff, now known as Michigan Canning & Machinery Company, had divested itself of all interest and these suits cannot be prosecuted jointly by the Michigan Canning & Machinery Company and the new Dunkley Company.

Defendants opposed this motion. In opposition they filed a complete copy of the "Transcript of Record on Appeal" in the Pasadena Canning case; the "Petition to the Supreme Court for Writ of Certiorari" therein, the briefs thereon; the "Transcript of Record on Appeal" in the case of "Dunkley Company v. California

Packing Corporation." Defendants also moved the court to request this court to permit the Honorable District Court to vacate and set aside the writ of injunction and every order, judgment and decree made in each of these cases, and grant a retrial, notwithstanding the mandate of this court. [Trans. Rec. pp. 10-16.]

Among the grounds of defendants' opposition to this motion was that the original plaintiff had completely divested itself *as early as July 25, 1916* of all right, title and interest in the subject matter in suit; that it no longer after *July 25, 1916* had any interest whatsoever in the suits; that at least as early as *July 25, 1916* the suits had abated because the plaintiff had divested itself of all interest therein and that all proceedings in the suit since *July 25, 1916* were nugatory and void; and that the injunctions and decrees must be set aside as plaintiff had no right to prosecute the suits or to any relief therein.

Another ground was that according to plaintiff's own motion the suits had abated on July 25, 1916, when the original plaintiff divested itself of the legal title to the patent; that thereafter the suits could not proceed because the necessary parties plaintiff were not before the court.

Hearing upon these motions was by consent suspended pending the final determination of the Pasadena Canning case and of the California Packing Corporation case.

On August 22, 1921, His Honor Judge Van Fleet rendered an opinion denying defendants' said motion and granting "that of plaintiff to add the new party." [Trans. Rec. pp. 279-297.] From this denial of the court to vacate the injunction and the granting of plaintiff's said motion, defendants appealed.

The Suits Now Defective by Reason of Misjoinder of Parties Plaintiff.

At the threshold we point out to the court that even under appellee's theory of procedure the suits are now defective and cannot be maintained because Michigan Canning & Machinery Company is not a proper party plaintiff and has no interest in the subject litigation; that the new Dunkley Company is the sole proper party plaintiff in interest. This is so elementary that it would not seem to require the citation of authority. An example of such authority, however, is the decision of the Circuit Court of Appeals for the Third Circuit in Pittsburg, S. & N. R. Co. v. Fiske, 178 Fed. 66:

> "Generally, when a complainant, suing in his own right and alone, parts *pendente lite* with his interest in the subject-matter of the litigation, he cannot further prosecute the suit."

We therefore submit that inasmuch as the original plaintiff has admitted that these suits are defective for want of proper parties plaintiff, the plaintiff's motion instead of curing such defect has on the contrary resulted in a misjoinder of parties plaintiff and the order appealed from must be reversed.

Under the Showing of Plaintiff's Motion, All Proceedings in These Suits Subsequent to July 25, 1916, Were Void, Nugatory and of No Effect.

Plaintiffs' motion shows that *the legal title* to the patent in suit was completely vested in the new 1916 Dunkley Company on July 25, 1916. There existed no right in the plaintiff Michigan Canning & Machinery Company to continue these suits as *sole* plaintiff after that date.

Waterman v. Mackenzie, 138 U. S. 252.

It is elementary that the holder of the legal title must be a party to the suit.

Bowers Hydraulic Dredging Co. v. Vare, 112 Fed. 63;

Excelsior Wooden Pipe Co. v. Seattle, 117 Fed. 140.

When, as admitted by plaintiff's motion, the original plaintiff assigned all the legal title to the patent in suit on July 25, 1916, to the new Dunkley Company, the latter became a necessary party plaintiff and the suit abated until the assignee was properly brought into the litigation as a party plaintiff.

These facts being undisputed the District Court should have set aside the interlocutory decrees and vacated the injunctions, as they were void.

On the showing made by plaintiff's own motion the suits abated prior to His Honor Judge Van Fleet rendering a decision. At the time of the entry of the

interlocutory decrees, the necessary parties plaintiff were not before the court.

Inasmuch as this court in its mandates reserved to the lower court the question of proper parties, defendants submit that this entire matter was referred to and reserved to the District Court for determination and should have been determined according to law and equity.

The Order of the District Court Was Erroneous. It Should Have Granted Leave to the New Dunkley Company to File a Supplemental Pleading Tendering Proper Issues Calling for an Answer by Defendants. The Effect of Such a Supplemental Pleading Would Have Been to Vacate and Set Aside the Interlocutory Decree, the Injunction and All Proceedings Since July 25, 1916.

Under equity practice before the new rules, an original bill in the nature of a supplemental bill was required to bring in an assignee of a sole plaintiff.

Under the new equity rules, while names and form have become immaterial, all substantial matters of substance remain unchanged. A common example of this is that although "demurrers" and "pleas" are abolished and a "motion to dismiss" substituted, thus avoiding matters of form, certificates of counsel, affidavits that such demurrers or pleas are not interposed merely for the purpose of delays, etc., the legal substance remains the same and unaffected.

Unquestionably under the former equity rules a mere motion to substitute an assignee of a sole plaintiff would have been insufficient. *An original bill in the nature of a supplemental bill would have been required.* And defendant would have been required to answer thereto. Thus presenting the issues of law and fact.

We submit that a mere motion is insufficient under the new rules. A supplemental pleading is required. Such supplemental pleading must contain the allegations upon which the alleged transfer of interest is based. Defendant has a right to his day in court upon such allegations. Pleadings are required to make up such issues. Where a mere motion is filed and the court proceeds as did the District Court the defendant is foreclosed of its opportunity of cross-examining witnesses and of producing witnesses in its behalf. It is denied its day in court.

We submit that Equity Rule 34 is a direct recognition that a mere motion is insufficient; that a supplemental pleading is required; and that such supplemental pleading must be in substance that which is required under the old equity practice in an original bill in the nature of a supplemental bill. Equity Rule 34 is as follows:

> "34. SUPPLEMENTAL PLEADING. Upon application of either party the court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when

> it was made, including the judgment or decree of a competent court rendered after the commencement of the suit, determining the matters in controversy or a part thereof."

In Kryptok Co. v. Haussmann & Co., 216 Fed. 267, the court required a supplemental bill, the second syllabus reading:

> "Where matters, sought to be brought into the pleadings, have occurred since the filing of the original bill, they must be brought in by supplemental bill and not by amendment."

By the procedure adopted by the District Court, defendants are foreclosed, for example, against hearing an adjudication of the assertion of plaintiff's motion that the new Dunkley Company is the old Michigan Canning & Machinery Company after reincorporation with increased capital stock. Defendants assert that it is an entirely separate and distinct corporation.

Furthermore, defendants assert and will prove by proper testimony of witnesses (when given the rightful legal opportunity at trial), that on *July 25, 1916,* the new 1916 Dunkley Company became vested with every part and parcel of interest theretofore owned by the original plaintiff in the patent in suit and every right of action arising thereunder.

It is to be noted that plaintiff's motion was based upon "the depositions of Henry W. Hardy, W. F. Burrows and Henry Veeder" taken in the Pasadena Canning case. These depositions are reproduced in the

Printed Transcript of Record on Appeal in the Pasadena Canning case, which is a part of the transcript of record on appeal herein by stipulation. These depositions will be found in volume II of such transcript, pages 493-549. The testimony of these witnesses shows that on *May 27, 1915,* an agreement in writing was entered into between W. F. Burrows and S. J. Dunkley. It appears that Mr. Burrows was acting on behalf of Libby, McNeil & Libby and on behalf of the new corporation to be formed. A written agreement was entered into, which appears in volume III of the Printed Transcript of Record on Appeal of the Pasadena Canning case, pages 936-943, in connection with the testimony of Phillip Larmon. By the terms of this agreement the original plaintiff agreed to deliver and place Mr. Burrows "in possession of all of the assets, rights and property of every name, nature and character belonging to said Dunkley Company, a corporation." [Pasadena Canning Company case, printed Trans. of Rec. p. 937.] The new corporation to be formed and known as Dunkley Company was "to take over and acquire all of the assets and property and rights of every character and nature, of and belonging to said Dunkley Company, in accordance with the terms of this contract; to discharge all the obligations and liabilities of said Dunkley Company, * * *" [p. 939].

The patent in suit is particularly and specifically enumerated in the list of patents to be transferred. [P. 944.]

The testimony of Messrs. Hardy, Burrows, Veeder and Larmon conclusively shows that prior to July 25, 1916, the new Dunkley Company did take over and take control of all of the assets and property of the old plaintiff and did assume its obligations.

The rights of action for past infringement of the letters patent in suit were one of the choses in action which were those transferred to the new Dunkley Company so that on July 25, 1916, such new Dunkley Company owned absolutely all the patent in suit and all of the rights ever theretofore owned, in such patent or arising out of such patent, by the original plaintiff.

This is not simply the construction placed upon this testimony by defendants' counsel. On the contrary, it is the construction placed upon the facts by plaintiff's counsel. In the case of Dunkley Company v. Pasadena Canning Company on the motion to dismiss, there was presented the affidavit of S. J. Dunkley. [Trans. Rec. on Appeal, Pasadena Canning case, pp. 70-73.] In this affidavit Mr. Dunkley states:

> "Thereafter, to wit, on or about July 25th, 1916, the said Michigan Canning & Machinery Company (being the plaintiff herein after the change of its name from Dunkley Company as aforesaid) by an instrument in writing duly executed and acknowledged, sold, assigned and transferred the whole right, title and interest in and to the said letters patent, No. 1,104,175 of July 21, 1914, being the patent sued on, to the said new Dunkley Com-

pany, which was incorporated on or about the 12th day of January, 1916, as hereinabove alleged. The said assignment was duly recorded in the Patent Office of the United States on September 21, 1916, in Liber Q 101, page 59, of Transfers of Patents, *and ever since said assignment the said new Dunkley Company has been and is now the sole owner and holder of the said letters patent and of all the rights, liberties and privileges by them granted.* A copy of the said assignment is hereunto annexed and marked 'Exhibit C.'

"By virtue of the premises the old Dunkley Company, plaintiff in this case, now known as the Michigan Canning & Machinery Company, *has ceased to have any right, title or interest in the patent sued on or the cause of action sued on,* and no longer has any cause of action against the defendant herein, in respect of the matters alleged in the bill." (Italics supplied.)

Plaintiff's attorneys knew of this assignment prior to the trial of these cases. See testimony of Henry Veeder, Pasadena Canning Company, Record, page 544.

While the assignment of the legal title to letters patent must be in writing, there is no requirement that an assignment of the chose in action arising from past infringement of a patent, be in writing. On the contrary the law of the state prevails. It is the general rule that an assignment of a chose in action by parol is legal and effective.

Hooker v. Eagle Bank, 30 N. Y. 83;
Draper v. Fletcher, 26 Mich. 154;
Speers v. Willis, 151 N. M. 443;

Seymour v. C. Aultman & Co., 109 Iowa 297, 80 N. W. 401;
Throop Grain Cleaner Co. v. Smith, 3 How. Pr. (N. S.) 290;
Roberts v. First Nat'l Bank, 18 N. D. 474, 79 N. W. 993;
Brokaw v. Brokaw's Ex'rs. (N. J.) 4 Atl. 66;
McConaughey v. Bennett's Ex'rs., 50 W. Va. 172, 40 S. E. 540;
Macklen v. Knealy, 141 Mo. 113, 41 S. W. 893;
Tatum v. Ballard, 94 Va. 370, 26 S. E. 87;
Albert Wilt v. Huffman, 46 W. Va. 473, 33 S. E. 279.

The right to recover for past infringement of a patent is a "chose in action."

32 Cyc. 679.

Defendants submit that under the agreement for the organization of the new 1916 Dunkley Company and the execution by the latter of the terms of such agreement, by its performance thereof, by its taking over all the assets and assuming all the liabilities of the original plaintiff, as testified by the witnesses, a complete transfer by parol and a taking into possession of the new Dunkley Company of the choses in action for past infringement of the patents in suit is shown. This being the case then when the written instrument of assignment was on July 25, 1916, delivered to the new Dunkley Company it was put in possession of and owned both the legal title to the patent in suit and all

rights of action for past infringement. Nothing was left in the old plaintiff and it ceased to have any right to prosecute or interest in this litigation.

Equity will regard the agreement between the original plaintiff and the new Dunkley Company with regard to the transfer of all its assets, including patents and causes of action for past infringement, as fully executed, for the purpose of determining who are indispensible parties.

> Wheeler v. McCormick, 29 Fed. Cases No. 17,499.

The Abatement of the Suits by Transfer of Interest of Plaintiff Rendered All Proceedings Subsequent to July 25, 1916, Nugatory.

The Circuit Court of Appeals for the Second Circuit (Circuit Judges Wallace, Lacombe and Coxe), in the leading case upon this subject, Automatic Switch Co. v. Cutler-Hammer Mfg. Co., 147 Fed. 250, says:

> "After the Circuit Court had filed its opinion, and before the decree was signed, defendant on March 27, 1905, suggested the existence of an assignment which it contended operated to abate the action and prayed for a dismissal of the bill or for such other relief as might seem equitable, just and proper. Nevertheless, on April 20, 1905, the Circuit Court denied the motion and signed the decree. No discussion of this point is found in the record. Quite possibly the court thought it best that its decision on the merits should be embodied

in a decree, and that the technical point thus raised should be reserved for the appellate tribunal. It seems to be controlling of the disposition to be made of this appeal. The bill of complaint was filed July 2, 1901. On July 10, 1902, the complainant, sole complainant, executed an assignment to the Otis Elevator Company. This document, after reciting that the Automatic Switch Company 'are now the sole owners of * * * the said patent and invention and * * * all rights thereunder,' in consideration of $5 and other valuable considerations sold, assigned, transferred, and set over to the said Otis Elevator Company, its successors and assigns, 'the entire right, title and interest which we have or may have in, to and under the aforesaid letters patent, invention and improvement and any reissues or extensions of said letters patent granted or to be granted throughout the United States and the territories thereof,' and also 'any and all claims or demands for damages and profits accrued or to accrue for past or any use of said improvements or invention without right or license, with the right to use our name in legal proceedings and to sue for and recover all such damages and profits.' By this conveyance the switch company stripped itself of every right, title, and interest to, in, and under the patent—nothing was left to it. The assignment states that it is agreed between the switch company and the Otis Company that in the event of the patent being sustained by the Court of Appeals in the suit at bar the Otis Company would pay an additional consideration of $2,000. That agreement gave the switch com-

pany no legal or equitable interest in the patent. It was further agreed that the Otis Company should pay all subsequent expenses of the litigation, and that the switch company should devote its best energies to pushing the suit to a final determination under the supervision and direction of the Otis Company. This agreement in no wise changed the mutual relations of the parties to the assignment." (Quotation continued on insert A)

A.

"The effect of this assignment was to abate the suit. If a sole plaintiff, suing in his own right, assigns his whole interest to another, he is no longer able to prosecute the suit because he is without interest in the litigation. It is unnecessary to refer to any authorities in addition to those cited in our opinion in Ecaubert v. Appleton, 67 Fed. 917, 15 C. C. A. 73. The suit is completely suspended and cannot be proceeded in till it is revived, and all orders and proceedings pending such abatement will be considered nugatory. After such an abatement, i. e., one caused by assignment of plaintiff's whole interest, the successor in interest, claiming by a title which may be litigated, may revive the suit by an original bill in the nature of a supplemental bill. Of such a bill Story says:

" 'But in the other case (an original bill in the nature of a supplemental bill) a new defense may be made. The pleadings and depositions cannot be used in the same manner, as if filed or taken in the same cause; and the decree, if any has been obtained, is not otherwise of advantage than as it may be an inducement to the court to make a similar decree.' Equity Pleading (9th Ed.) 384.

(Over)

in a decree, and that the technical point thus raised should be reserved for the appellate tribunal. It seems to be controlling of the disposition to be made of this appeal. The bill of complaint was filed July 2, 1901. On July 10, 1902, the complainant, sole complainant, executed an assignment to the Otis Elevator Company. This document, after reciting that the Automatic Switch Company 'are now the sole owners of

> "From the execution and delivery of the first assignment till after the filing of the opinion in the Circuit Court, a period of nearly three years, the litigation was being conducted by a person who had no interest in the patent or in any claim arising under the patent. Under all the authorities such proceedings were nugatory. The defendant was entitled to have the controversy conducted, not by a stranger, but by the owner of the patent and of the claims for profits and damages, and all the testimony taken in such a moot case may be disregarded, and any orders made during such period may be discharged."

pany no legal or equitable interest in the patent. It was further agreed that the Otis Company should pay all subsequent expenses of the litigation, and that the switch company should devote its best energies to pushing the suit to a final determination under the supervision and direction of the Otis Company. This agreement in no wise changed the mutual relations of the parties to the assignment." (Quotation continued on insert A)

The Circuit Court of Appeals for the Third Circuit (Circuit Judges Gray and Lanning and District Judge McPherson) in Pittsburgh, S. & N. R. Co. v. Fiske, 178 Fed. 66, says:

"Generally, when a complainant, suing in his own right and alone, parts *pendente lite* with his interest in the subject-matter of the litigation, he cannot further prosecute the suit. It then becomes so defective that, for further prosecution, his grantee or assignee must by appropriate procedure come into the suit, to the end that the complainant on the record shall be one who has a real interest. *The usual procedure in such a case is by an original bill in the nature of a supplemental bill.* 3 Dan. Ch. Pl. & Pr. (1st Am. Ed.) 1663, 1664; Story's Eq. Pl. § 349; Beach's Modern Eq. Pr. § 481; 1 Foster's Federal Practice, § 186. Equity Rule 57 recognizes this practice by providing that, whenever a suit in equity becomes defective from any event happening after the filing of the bill, leave may be granted to file a supplemental bill, or a bill in the nature of a supplemental bill. * * * But in Fulton v. Greacen,

44 N. J. Eq. 443, 15 Atl. 827, Vice Chancellor Van Fleet said:

" 'The principle is elementary that a complainant, suing in his own right and alone, cannot, after he has parted with his whole interest in the subject-matter of the litigation, further prosecute the action.' * * *

"In Brewer v. Dodge, 28 Mich. 359, the bill was dismissed. On appeal, the Supreme Court of Michigan said:

" 'It appears from complainant's own showing that in June, 1870, he conveyed the premises in dispute to one Charles E. Ritson. Ritson never made himself a party to the suit. By that conveyance complainant ceased to have any further interest in the controversy. If any one was injuriously affected by any subsequent proceedings, it was Ritson, and not complainant. It was no concern of his, after he had sold out all his interest. A court of equity must have the real parties before it, and will not permit a party who has voluntarily divested himself of any claim on his own behalf to continue litigating. *As soon as a complainant assigns his rights, the suit as to him ceases, and becomes as defective for want of a complaint as if it had abated by his death. It can only be restored to activity by bringing the rights of the assignee before the court.* Webster v. Hitchcock, 11 Mich. 56; Perkins v. Perkins, 16 Mich. 162. The complainant, therefore, was a mere interloper, after the date of his deed, and has no right to complain that his bill was dismissed. He had put himself out of court so far as any rights were concerned. The controversy

was no longer his controversy, and the right to pursue it had been terminated as to him by his own act. He could not proceed alone, except for his sole grievances. Whether the decree would have been right or wrong if he had retained his interest, it was unquestionably right to dismiss the bill when the complainant had no interest. He was in the same position then as if his bill had shown on its face that the interest had been parted with before the commencement of suit.'" (Italics supplied.)

In Tappan v. Smith, Fed. Cas. No. 13,748, it is said:

"Where a sole plaintiff, suing in his own right, assigns his whole interest to another, the plaintiff being no longer able to prosecute for want of interest, and his assignee claiming by a title which may be litigated, the benefit of the proceedings cannot be obtained by a supplemental bill, but must be brought by an original bill in the nature of a supplemental bill. Mitf. Eq. Pl. 65. In 2 Daniell, Ch. Pl. & Prac. 1518, the same position is quoted from Lord Redesdale, and the reason for the distinction between a supplemental bill and a bill in the nature of a supplemental bill is there given. In the first case the original suit may proceed after the supplemental bill has been filed, in the same manner as if the original plaintiff had continued such, except that the defendant must answer the supplemental bill, and either admit or put in issue the title of the new plaintiff; but in the case of an original bill in the nature of a supplemental bill, the whole case is open."

In Hoxie v. Carr, Fed. Cas. No. 6,802, Circuit Justice Story says:

> "The general rule, that all persons in interest must be made parties before a decree, is clearly applicable to the present case. But the omission of such parties is no necessary cause of abatement of the suit. *That can arise only from matters subsequent to the bill.* It may be ground, at the hearing, for a dismission of the bill without prejudice for want of proper parties, or for an order, that the bill shall stand over to make new parties, with leave to file a supplemental bill. See Coop. Eq. Pl. pp. 63, 64, 73-75, c. 1. § 4; *Id.* p. 214, c. 3, § 4; Goodwin v. Goodwin, 3 Atk. 370; Whitcomb v. Minchin, 5 Madd. 91; Foster v. Deacon, 6 Madd. 59; Bishop of Winchester v. Beaver, 3 Ves. 314. *As to the conveyance of the plaintiff, as well as the sheriff's deeds executed pendente lite, if they had disposed of all the rights of the plaintiff, there would certainly have been an end to his bill for a total defect of merits; for it is very clear that no party can stand before the court for a decree, who has no farther interest in the suit, either formal or real.* Coop. Eq. Pl. p. 166, c. 3. § 2; *Id* p. 196, § 3; *Id.* pp. 210-212, § 4; Harris v. Pollard, 3 P. Wms. 348; Benfield v. Solomons, 9 Ves. 77. And where the interests of new parties intervene, *pendente lite,* having derivative titles under the plaintiff, there the suit *may abate or become defective.* (Coop. Eq. Pl. pp. 63, 64, 76, 77, c. 1, § 4; 1 Cooke, Bank. Laws, 4th Ed., p. 558, c. 14, § 3; Williams v. Kinder, 4 Ves. 387); though it would, or might be different in the case of derivative titles under the defend-

> ant, *pendente lite* (Bishop of Winchester v. Paine, 11 Ves. 194; Metcalfe v. Pulvertoft, 2 Ves. & B. 200). But the nature of an abatement in equity seems to have been misunderstood at the argument. It is not, necessarily, a destruction of the suit, like an abatement at law, where a judgment, *quod cassetur,* is entered. It is merely an interruption to the suit, suspending its progress, until the new parties are brought before the court; and if this is not done at a proper time, *the court will dismiss the suit.* Coop. Eq. Pl. pp. 63, 64, 74-77, c. 1, § 4; Brown v. Higden, 1 Atk. 291; Williams v. Kinder, 4 Ves. 387; 1 Hov. Supp. p. 344, note to case, 4 Ves. 387; Anon., 1 Atk. 89; *Id.,* 263, and note of Sanders. But in any case of a purchase, or transfer of interest, *pendente lite,* the proper parties may be brought before the court. Coop. Eq. Pl. pp. 76, 77, c. 1, § 4; Merywether v. Mellish, 13 Ves. 161. So that the question is brought to this, whether the present cause shall stand over for the purpose of allowing a supplemental bill to be filed by or against the purchasers." (Italics supplied.)

In Ross v. City of Ft. Wayne, 63 Fed. 466, the Court of Appeals for the Seventh Circuit (Circuit Judges Woods and Jenkins and District Judge Seaman) discusses the question of the effect of an assignment by the sole complainant of all his interest in the patent in suit in equity and says (pp. 470-1):

> "But if a sole complainant suing in his own right is deprived of his whole interest, as in the case of bankruptcy, or if he assigns his whole in-

terest to another, he is no longer able to prosecute the suit, for want of interest, and the assignee may be made complainant in his stead; but, as the title of the latter may be litigated, the substitution must be accomplished by means of an original bill in the nature of a supplemental bill. *Id.* § 349; 2 Daniell, Ch. Pl. & Pr. c. 33."

Circuit Judge Kohlsaat in George W. Jackson, Inc., v. Friestedt Interlocking Channel Bar Co., *et al.,* 159 Fed. 496, holds that where a complainant assigns his right under a patent pending suit for its infringement the assignee must file an original bill in the nature of a supplemental bill, citing 21 Encyclopedia of Pleading and Practice, 39.

In Vigneron v. Auto Time Saver Repair Kit Co., 171 Fed. 580, Circuit Judge Lowell discusses the difference in effect between a supplemental bill and an original bill in the nature of a supplemental bill, holding that upon filing an original bill in the nature of a supplemental bill *the complainants must take proofs anew.*

In Campbell v. City of New York, 35 Fed. 14, Judge Wallace holds that where the complainant in an original bill has, since bringing the suit, parted with his whole interest in the subject-matter, and those for whom he was trustee have transferred their whole interest in the subject-matter to A, and the title to any sum of money which may be recovered in the suit has by these transfers become vested in A., the remedy

of A. is by an original bill in the nature of a supplemental bill, and not by a supplemental bill.

We submit upon the authority of the foregoing decisions that:

1. The original plaintiff had divested itself of all interest in the litigation prior to decision in the District Court, the suits stood abated and the interlocutory decrees and all proceedings thereafter were null and void and of no effect.

2. That the plaintiffs are not in a position to ask the court to relieve them from the effect of this assignment. The officers of these corporations and their counsel had full knowledge of these assignments and transfers and concealed them. The deposition of Mr. Veeder shows that the matter was considered. There would be no equity in now permitting plaintiffs to be relieved from the legal effect of plaintiffs' own deliberate action.

Especially is this true when plaintiffs now seek to bind the defendants by a technical rule to prevent equity and justice being done in this litigation.

The patent in suit has been held void in the Pasadena Canning Company case.

The record in that case shows that injustice has been done these defendants by the misrepresentations and concealments on behalf of the plaintiffs in these cases. These matters are considered and briefed in detail by defendants in their brief on defendants' motion for leave to file a bill in the nature of a bill of review.

We shall not, therefore, discuss this new evidence or the change of testimony of plaintiffs' witnesses on vital and material matters fully or in detail herein, but request Your Honors to consider the discussions of these questions as the same appear in defendants' brief upon said motion for leave to file an original bill in the nature of a bill of review in these cases.

Defendants submit that no court of equity would consider relieving plaintiffs from the effect of their deliberate concealment of the transfer of interest pending suit and at the same time bind defendants by a strict technicality preventing a new trial and the substantial determination of the litigation upon its real merits.

Conclusion.

Defendants, therefore, submit that the order appealed from should be reversed and the cause remanded with instructions to set aside the interlocutory decrees and vacate the injunctions for each of the following reasons:

1. Assuming solely the facts as appearing upon the face of plaintiffs' motion, these suits abated on July 25, 1916, when the legal title to the patent in suit was transferred to the new Dunkley Company; therefore, the indispensible parties plaintiff were not before the court and all proceedings thereafter were void.

2. That as a matter of fact the new Dunkley Company was the exclusive owner and holder and in pos-

session on July 25, 1916, of the legal title both to the patent in suit and all rights of action involved in these cases and the original plaintiff had divested itself of any interest in this litigation; the suits had therefore abated and all proceedings thereafter were void and nugatory and of no effect whatever.

3. That regardless of what the pleading be called under the new equity rules, the new Dunkley Company is the only party plaintiff entitled to prosecute suits for infringement against these defendants; that it must file in the District Court a suitable supplemental pleading alleging the facts of transfer, etc.; that the effect of such supplemental pleading will be identically the same as filing "an original bill in the nature of a supplemental bill" as technically named under the old rules; to wit, to set aside all proceedings after the assignment and transfer and to require a trial of the cases upon their merits (in accordance with the foregoing authorities), after issues joined upon such supplemental pleading.

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Attorneys for Appellants.

No. 3824

In The

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CENTRAL CALIFORNIA CANNERIES COMPANY, GRIFFIN & SKELLEY COMPANY, J. C. AINSLEY PACKING COMPANY, ANDERSON-BARNGROVER MANUFACTURING COMPANY, GOLDEN GATE PACKING COMPANY, J. F. PYLE & SON, INC., HUNT BROTHERS COMPANY, SUNLIT FRUIT COMPANY,

Appellants,

v.

DUNKLEY COMPANY (now known as Michigan Canning & Machinery Company) and DUNKLEY COMPANY,

Appellees.

BRIEF FOR DUNKLEY COMPANY, ET AL., OPPOSING MOTION AND PETITION FOR LEAVE TO FILE AN ORIGINAL BILL IN THE NATURE OF A BILL OF REVIEW.

FILED
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In the United States Circuit Court of Appeals for the Ninth Circuit.

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BRIEF FOR DUNKLEY COMPANY, ET AL., OPPOSING MOTION AND PETITION FOR LEAVE TO FILE AN ORIGINAL BILL IN THE NATURE OF A BILL OF REVIEW.

This notice was served for a hearing about the 6th of February, 1922, and it has been continued to the

present time because of engagement of counsel for appellants in the Supreme Court of United States.

The motion was sworn to (p. 55 of printed petition) on the 5th day of January, 1922, and its receipt was acknowledged by counsel for appellees on January 6th, 1922.

We will consider this matter as to defendants' right to present this petition at this time, and also the merits which have already been passed upon by the court below, this motion amounting to a request to that court to consider again matter already fully reviewed on the merits.

First: No diligence has been manifested on the part of appellants, three years substantially having elapsed since they were in possession of this information.

Second: The same matter has already been submitted to the court below on the motion for a request of that court to this court to recall its mandate and permit the case to be reopened, and the relief sought had been denied, the merits being incidentally considered and an appeal being denied.

Third: This court has already passed upon the matter and had at the time of the issue of its mandate. Therefore such mandate ought not and could not properly be recalled, as pointed out by the court below, speaking by Judge Van Fleet.

Fourth: The court below, speaking by Judge Van Fleet, as a further reason for refusing to request this court to recall its mandate, considered the entire matter

on its merits at great length, and declined particularly to consider the matter because there was no merit in petitioners' case, no showing having been made that should in any way modify the original decision herein, there being no proof whatsoever of the quality and character called for by a long line of decisions of the Supreme Court and of this court as necessary to anticipate a patent on a meritorious invention. See:

Barbed Wire Patent, 143 U. S. 275, 36 L. Ed. 158.

Diamond Patent Co. v. S. E. Carr, 217 Fed. 400 (C. C. A. 9th).

Symington v. National Malleable, 250 U. S. 383, 386.

Deering v. Winona Harvester Works, 155 U. S. 286, 300.

to the latter two cases of which Judge Van Fleet took particular pains to refer in his consideration of the merits.

Fifth: We will then consider the merits of all matter herein presented, and point out wherein the petition and showing is not of such quality and character as to warrant its consideration in the anticipation of a patent on a meritorious invention. The showing fails completely to comply with the showing above required.

Sixth: The Dunkley patent has not only the prestige of an issued and adjudicated document, but is supported by the undisputed testimony of a large number of unimpeachable witnesses whose testimony is confirmed and supported by all the pertinent documentary proofs in this case.

First—No diligence has been manifested on the part of defendants.

We emphasize that no diligence has been manifested on the part of the appellants herein. Newly discovered evidence is referred to at page 19 of the printed petition, and it is pointed out that it was developed in the trial at Los Angeles which began May 21, 1918, and continued until July 2, 1918, about three and one-half years before the execution of the petition herein. This is pointed out under items lettered (a), (b), (c) and (d) at pages 19 to 31 of the printed petition.

There is no explanation of the want of diligence in bringing that matter to the attention of this court.

The items appearing in paragraph (e), petition page 31, were developed in the trial of the case in New York, showing the production of the Dunkley pay rolls. No date is vouchsafed in that paragraph, but the New York trial occurred in October, 1918. The pay rolls referred to were therefore in the possession of appellants for more than three years.

Paragraph (f), petition page 32, points out new matter discovered in an article in the "Weekly Tribune-Messenger" of April 22, 1904. The diligence (?) particularly as to that paragraph is pointed out at page 37 of the petition, where it appears that this was discovered and made known to Kemper B. Campbell (who swore to these petitions on January 5th, 1922) on January 18, 1919, nearly three years before the date of execution of the petitions herein.

As to the matter appearing in paragraph (g), petition page 34, it is pointed out so far as Arthur W. Norton is concerned that the said Kemper B. Campbell called on him about the month of February, 1918, and that in November, 1918, at Baltimore, Maryland, the attention of said Norton was called by Francis J. Heney to certain correspondence and that

> "as a result thereof the sequence of events occurring at South Haven had become clear to him (Norton) and that he was then able and willing to testify to certain facts which were subsequently, to-wit, on December 6, 1918" (more than three years before the date of the petition herein) "and February 10, 1919" (nearly three years before) "expressed in the affidavits referred to in subdivision (g) of paragraph IV hereof" (printed petition, page 39).

The lapse of three years is unexplained. This is not such diligence as would warrant the consideration of a petition to file an original bill in the nature of a bill of review. No item appears herein which is presented as new matter which is recently discovered, the most recent having been known to petitioners nearly three years.

Second—The matter here submitted has already been decided by the court below on special application in the instant cause. The order being interlocutory is not appealable.

This whole matter, each and every item of it, has been passed upon in the instant cause, having been presented to the District Court in motion of defendants and application for a request to the Circuit Court of Appeals to recall its mandate and for a rehearing, which motion was noticed for November 11, 1918 (page 10 of Record No. 3824). The whole matter has been considered by Judge Van Fleet of that court on its merits, as well as on the question of diligence and a matter of right. It was not appealable matter and the petition for appeal was not allowed.

Judge Van Fleet has said in effect that he considered that the defendants were foreclosed in making its application at that time, saying at page 282 of Record 3824:

> "It appears that defendants first presented a motion to accomplish the same purpose and upon the same showing to the Circuit Court of Appeals in these cases, after its denial of a rehearing but before the remittitur had been sent down; but that court" (meaning this Circuit Court of Appeals) "peremptorily denied the defendants' motion, without opinion, and by an order which is wholly silent as to defendants having leave to apply to this court for such relief."

Judge Van Fleet then stated:

> "This action is now made the basis of an objection by the plaintiff that the defendants are pre-

> cluded from renewing the present motion here and that this court is concluded by the ruling of the Circuit Court of Appeals from granting the relief asked."

Judge Van Fleet then explained that he

> "was disposed at the argument to regard the objection rather lightly but a more mature consideration of the authorities discloses that the question is not free from doubt."

He then explains (bottom of page 284 of Record 3824):

> "But however the objection should be decided, is, in the view I take of the merits, of little moment in the present case."

Explaining:

> "I say this for the reason that, after a very careful *review of the voluminous record,* I find myself able to take no more favorable view of this application than that indicated by the court of appeals."

Judge Van Fleet thereupon considered the entire merits and there was also a complete review of each and every item here presented, the same appearing in the printed appeal record herein. Judge Van Fleet stated his opinion fully and clearly thereon, his opinion extending from page 279 to page 297 of Record 3824.

It thus appears that every matter that defendants now seek to present by their original bill in the nature of a bill of review, has already been presented to the court below and been considered on its merits; and not

being an appealable matter no appeal has been allowed thereon. Such matter as there presented is not proper to be appealed from in an interlocutory decree. If there is anything to review, it should come, and can properly come, on an appeal to review the final decree in the case when the same is entered. See:

National Brake & Electric Co. v. Christiansen, 254 U. S. 425.

We believe, however, that the whole matter has been concluded and decided, and that it would not receive consideration if brought to the attention of the court on an appeal from a final decree.

Third—This court has already passed upon the matter and it is proper to be considered as having been adjudicated.

Aside from the fact that the merits of this matter have already been considered by the District Court and are the subject matter of the petition for appeal refused herein, this court has already passed upon the substance of this matter, and had considered the same at the time of the issuing of its mandate.

Consequently the defendants are in the position of now asking the court to grant permission to file an original bill in the nature of a bill of review on matter which they had submitted to this court before the issuing of its mandate.

This was submitted in the notice of "motion for orders vacating decree affirming decrees of the District

Court, etc.," filed May 1, 1918, the same having been argued by counsel on May 6, 1918, and decided May 20, 1918.

This is referred to by Judge Van Fleet in his decision in the appeal record No. 3824, where at page 282 he says:

> "This action is now made the basis of an objection by plaintiff that the defendants are precluded from renewing the present motion here, and that this court is concluded by the ruling of the Circuit Court of Appeals from granting the relief asked."

This is certainly true, under the decision of *National Brake & Electric Co. v. Christiansen, supra.* The request having been made before the issuing of the mandate and the questions having been raised, they are not subject now to review, having already been passed upon by this court.

Defendants had their day in court.

Fourth—The merits of the matter presented have been considered by the court below and the relief denied and there is no merit in the matter here presented, and nothing that would warrant the invalidating of an issued patent, there being a showing only of oral testimony as to matters long past, unsupported by any pertinent documents.

Barbed Wire Patent, 143 U. S. 275, 36 L. Ed. 158.

Diamond Patent Co. v. Carr, 217 Fed. 400 (C. C. A. 9th).

Symington v. National Malleable, 250 U. S. 383, 386.

Deering v. Winona Harvester Works, 155 U. S. 286, 300.

In the appeal record No. 3824 Judge Van Fleet at page 279 explains his reason for considering the merits of this matter. Considering the claimed adjudication, he says at page 284:

> "But however the objection should be decided" (that is, the objection as to adjudication) "is, in the view I take of the merits, of little moment in the present case. I say this for the reason that, after a very careful review of the voluminous record, I find myself able to take no more favorable view of this application than that indicated by the court of appeals; and there can be no transgression or disparagement of the ruling of the latter court by looking into the record for the purpose of stating my reasons for that conclusion."

He then considered the Dunkley patent, the manner in

which it has been upheld by the Court of Appeals of the District of Columbia, and then comes to a consideration of matters pertinent in the case of *Dunkley v. Pasadena* and *Dunkley v. California Packing Corporation,* presented for the first time before Judge Trippett in the former case and later to Judge Hand in the latter case. He says at record page 287:

> "I have had the benefit of the views and comments found in the opinions of both my learned brothers, which led them to an opposite conclusion with myself as to the validity of the patent, yet nevertheless I am constrained to say, that with the highest consideration for the learning and ability of both, I am impressed with neither the character of the new evidence nor with the conclusions reached in those cases."

He then refers to the character of the testimony, saying:

> "That there was a cloud of 'new' witnesses it is quite true giving indication that the country had been raked with a fine-toothed comb so to speak; but there was little new evidence given by them—if the term be used to express the idea of material evidence. In fact, there is none aside from one or two items of so-called documentary proof which does not fall strictly within the characterization of the Supreme Court as being wholly insufficient in character as a basis to set aside or defeat an existing patent.
>
> In the very recent case of *Symington v. National Malleable Castings Co., et al., 250 U. S. 383, 386,* that court took occasion to say: 'This court has pointed out that oral testimony tending to show prior invention as against existing letters patent is, in the absence of models, drawings or kindred evidence, open to grave suspicion; par-

> ticularly if the testimony be taken after the lapse of years from the time of the alleged invention. *Deering v. Winona Harvester Works, 155 U. S. 286, 300'.*"

Judge Van Fleet then commented:

> "There is a striking *absence of* anything in the nature of *models, drawings or memoranda produced to support the mere oral statement* of these witnesses made in nearly every instance purely from memory, and this after a lapse of from fifteen to eighteen years; and as to the items of book entry and correspondence they were not only wholly inconclusive in their character but made as strongly in support of the plaintiff's theory as to the date the invention was put in practice as that of the defendants. Indeed I regard the item referred to as the '*Norton letters,*' to which much significance is attached, as making, in their sequence, when properly construed, *entirely in favor of the plaintiff.*"

He then discusses the decisions of Judge Trippett and Judge Hand, showing that they have not relied upon the documentary testimony at all in reaching their conclusions adverse to his own, but had been misled into considering things unquestionably recent as though they were prior art. He points out the consideration given by the Court of Appeals in its opinion to the witness Stewart Campbell, quoting the language of this court (R. pp. 290-291), and saying further (p. 291):

> "Campbell's testimony was not materially different before Judge Trippett but the latter does not advert to the aspect above discussed by the Circuit Court of Appeals, merely closing his consideration of the witness' evidence by saying:

'There is no reason in any event for discrediting Campbell.' ''

He explains the error of Judge Trippett and Judge Hand and points out that the Baker-Chalker orange washer device was before him, and that the model identified by Judge Hand was "*adapted from memory* by Baker" (p. 293). He points out (p. 294) his previous specific consideration of the Baker-Chalker device and that the same had been considered by this Court on appeal in affirming his views.

There is in this record No. 3824, beginning at page 10 with the motion and at p. 16 with the affidavits, the matter which was submitted to Judge Van Fleet. We consider the same briefly:

Augensen (R. pp. 19-22), and supplemental affidavit (R. pp. 24-5), identifies no pertinent documents. He shows a photograph of a brush machine which he said was installed in the spring of 1904. He *was not* at the Dunkley plant in the year *1903.*

Brazil (R. pp. 27-28), oral testimony merely about some accounts that might or might not have been pertinent.

Katherine Breen (R. p. 31), oral testimony about accounts having no relation to the subject in hand.

George K. Brown (R. pp. 34-37), oral testimony, with nothing produced that is pertinent to the subject in hand. Supplemental affidavit to the same effect at (R. p. 39).

Mrs. George K. Brown (R. pp. 43-45), same as her husband.

Fred J. Buckley (R. pp. 47-48), merely oral testimony, with nothing pertinent in the way of documentary proofs.

Kemper B. Campbell (R. pp. 50-74), one of the counsel for defendant in the case, states hearsay matters in connection with his "investigations." It shows great delay and no explanation of it. Nothing pertinent to the case because he has only *hearsay* knowledge.

Stewart Campbell (R. pp. 76-81) gave oral testimony in the main case, and adds nothing in the least pertinent here.

Robert H. Clark (R. pp. 83-84), oral testimony. He was a bookkeeper and produced some accounts of the Clark Engine & Boiler Company, but no documentary evidence that is pertinent.

Lyman L. Crosthwaite (R. pp. 87-89), identifies the article, "The canning factory is a busy place," of October 1, 1903. He has no knowledge and it does not appear why he should have had, as to new developments not desired to go to the public. Supplemental affidavit at R. pp. 89-91 was subscribed to on the 11th of February, 1919, in which he identifies the article in the Tribune-Messenger of April 19, 1904, reprinted in the edition of April 22, 1904, relating to installation of *two pitting* machines and *two paring* machines at the Dunkley canning factory. He refers to an article in the issue of June 17, 1904, as to his connection with the papers.

This document is of importance because it supports the plaintiff's position and will be referred to hereafter in that behalf. It is not a document that supports the contentions of defendants, that there was no machine installed in the year 1903. It would be quite remarkable that two entirely new lines should be installed in the Dunkley factory without a previous test. The document also points out the construction of a peeling table 110 feet long at that time, which shows how utterly Judge Trippett was misled when he said that the presence of a long table in the large canning factory of the Dunkley Company in 1903 was wholly inconsistent with the presence of the Dunkley peach peeling machine.

Martin DeLoof (R. pp. 93-95), gave only oral testimony. The pay rolls he refers to speak for themselves. They do not give any indication as to peach peeling. They do show certain important facts as to the untruthfulness of many of defendants' witnesses, who, however, were testifying orally.

Charles DePue (R. p. 98), gave oral testimony as to mere recollection.

Mrs. Charles DePue (Dena Corby; R. pp. 101-3), gave oral testimony only as to her recollection. She remembered that Miss Carrie Wing (now Mrs. Easterbrook) handed her a panful of peaches which had been peeled by the lye process. We have no doubt of this, and Mrs. DePue remembered that she had been instructed prior to that date *not* to refer to the peaches as lye peeled but as brush peeled, which is quite conclusive that this panful of fruit was not the first. She gave mere oral testimony of her recollection.

Charles M. Funk (R. pp. 105-7), bookkeeper of the Clark Engine & Boiler Company, testified as to recollection.

William A. Geiger (R. pp. 109-15), testified as to his recollection, and he had no opportunity to recollect anything earlier than the Fall of 1904.

George E. Grier (R. pp. 117-128), gave oral testimony as to matters fully presented by him in the main case, which has been considered and disposed of by Judge Van Fleet and this court. Grier has a lot of hearsay about W. R. Roach. Roach discreetly never put in an appearance to be cross examined.

George Harrold (R. pp. 130-1), gave oral testimony, nothing documentary, as to matters long past.

Mrs. George Harrold (R. pp. 133-5), says in substance the same as her husband.

John Hetherington (R. pp. 137-139), a mechanic, was at the Dunkley factory in 1904, and obviously had no knowledge of matters in 1903. A supplemental affidavit at (R. p. 142) relates to his 1904 recollection.

William Hinterliter (R. pp. 145-146), a resident of Los Angeles, not called as a witness at the trial there, testified to mere recollection.

Mary Z. Hinterliter (R. pp. 148-150), also a resident of Los Angeles, not called as a witness at the trial there, testifies as to mere recollection.

John Hodgson (R. pp. 152-3), with the American Can Company at Maywood, Illinois, did not testify in the main case, and has confessedly no knowledge of the year 1903.

Maud Howes (R. pp. 155-157) was bookkeeper for Clark Engine & Boiler Company, has no testimony except as to her recollection and the books are not shown to be pertinent.

Jacob Hycoop (R. pp. 159-161), testifies as to recollection and that he worked on a peeler in 1904, not in the least pertinent as to what occurred in 1903.

Dorothy Janashak (R. pp. 163-4), bookkeeper for the Kalamazoo Machine & Tool Company, identified books which have no relation to any work that had any particular bearing on the subject matter of this case.

Leander Kern (R. pp. 166-7), could have no recollection as he was not employed by Dunkley Company until 1907. He was in the factory at South Haven in 1910 and attempts to testify about records there, which can be of no consequence.

Mrs. Leander Kern (who was Verna Hallock), (R. pp. 170-3), a most voluble witness as to matters which occurred at South Haven in her absence. She having left South Haven for Kalamazoo about the middle of September, 1903, and testifying to matters at South Haven thereafter. Her testimony is not supported by documents and is hearsay.

Mrs. Krugler (R. pp. 175-6), gives mere oral testimony.

Edwin Mapes (R. pp. 178-180), gave oral testimony as to machinery. He produced some books of account which were considered in the main case by Judge Van Fleet.

McEwing (R. pp. 182-3), gave mere oral testimony showing that he could not have had any knowledge.

Bert McFarland (R. pp. 186-8), says he saw the small experimental brush machine in the Fall of 1903, and he asserts that it was not used commercially. He testifies about the long table, which is not material to the issue in hand.

John C. Miller (R. pp. 190-1), made the tin work for the long table in 1903. He obviously knows nothing about the peach peeling machine, as he had no opportunity to know.

Eleanor Moore (R. pp. 193-4), whose maiden name was Eleanor Wright and whose name does not appear on the pay rolls at the time she says she was with the Dunkley Company. Her testimony is to mere recollection.

George Myhan (R. pp. 196-7), one time postmaster of South Haven, testified orally as to mere recollection, unsupported by any document.

Charles R. Newton (R. pp. 200-1), testifies to mere recollection as to matters in 1903.

Robert Newton (R. pp. 203-5), gave oral testimony as to mere recollection. His testimony is wholly inconsist-

ent with the detailed testimony given in 1910 in the Dunkley-Beekhuis interference, where he testified to having seen the single line machine in use daily for several weeks in the summer and fall of 1903, and obviously he could not have mistaken it for the three line machine in use the next year. We think quite clearly his recollection at the earlier period, 1910, would have been superior to that given later on, when he was stimulated by agents of the defendants to recollect matters as they would like to have him recollect. He was afforded a pleasure trip to California and up and down the coast, which, of course, would result in a very kind feeling toward the defense. His story is highly improbable and not supported by any documents, and is contradictory to his earlier testimony.

Arthur W. Norton (R. pp. 206-212), gave his oral testimony without support of documentary proofs except that his recollection is wholly at variance with the documents he inspected. Clearly he could have been produced for cross examination in the New York case. There is nothing in his testimony which should be entitled to consideration now. His affidavit was sworn to on the 6th day of December, 1918. In his supplemental affidavit at (R. pp. 214-5) he says the machine of the first experimental model was made in the Fall of 1903. Maybe he regarded the use as a commercial experiment.

John F. Noud (R. pp. 217-8). We have no doubt he furnished the lumber for the long table in 1903, which has nothing to do with the merits of this case.

Nicholas Plating (R. pp. 220-22), testified that he worked on a soup tank, which we have no doubt he did,

but it has nothing to do with the case here in hand. His supplemental affidavit is at (R. pp. 224-5). He has no documentary proofs, he merely speaks from recollection, but we think his recollection is good and that he did make a soup tank.

Lewis Payne (R. pp. 227-8), made some patterns for the Dunkley Company at the order of Stewart Campbell in the spring of 1904. We have not the slightest doubt in the world that he did, but it shows nothing of any force in establishing matters in this case.

Daniel P. Robinson (R. pp. 229-32), speaks orally from recollection without the support of any documents and only testifies as to the spring or early summer of 1904 at the Dunkley factory in South Haven. He could have no recollection of matters pertinent to the issues in this case.

William C. Spencer (R. pp. 235-6), testifies as to occurrences during the peach season of 1904. Certainly this could not be pertinent as to happenings in 1903, and is oral testimony as to his mere recollection.

Mary J. Stafford (R. pp. 238-9), gave oral testimony as to her recollection, and she does not remember.

Fred Stebler (R. p. 242-3), is referred to by Judge Van Fleet as the one new witness relative to the Baker-Chalker machine who was not before him. He testified to his recollection of what he saw in about fifteen minutes at Fresno in the year 1902. He had no documents nor anything to support his testimony, and while he owns the Baker-Chalker patent, which if it was a

peach peeling machine would warrant his going into that business, he never had anything to do with the peach peeling business thereafter.

Harrie E. Stewart (R. pp. 246-7), one of the "investigators" of the defendants, could not possibly have any first hand knowledge to give any testimony about.

William Triece (R. pp. 249-250), gave oral testimony as to his recollection. We are quite sure that he did the wiring of the long table, he has books to show that. He remembers also that he saw the old machine, Exhibit No. 11, operated by hand in 1903. He remembers C. D. Crary there in 1903, as to which we believe he is mistaken because Crary testifies he was there in 1902, a very easy matter to mistake. But it is only recollection of events long past.

Abe Vanderbrook (R. pp. 254-6), gave oral testimony as to his recollection. On cross examination in the main case he remembered the test of the first machine in July, 1903, which confirms and supports Dunkley's testimony.

Van Ostrand (R. pp. 258-261), gave oral testimony as to his recollection of events long past. It will be noted that he signed by his mark, and we submit that it would be easy for an uneducated person to be mistaken as to documents and their substance. However, no documents are produced, he simply gives his recollection of events long past.

Mrs. Frank Webb (R. pp. 263-4), gave oral testimony

as to events long passed, unsupported by documentary proofs.

Mrs. Nellie Weed (R. pp. 266-7), gave oral testimony unsupported by any documents.

William K. White (R. pp. 269-278), counsel for defendants in the case, states his views about various matters in various ways. We cannot conceive that it can be of interest in the consideration of the facts, of which he had no knowledge.

We are very sure that this testimony is not of a character that should be considered, under the decision of the Supreme Court in the Barbed Wire Patent, and of this Court in *Diamond Patent Co. v. Starr,* and under the rule of *Symington v. National Malleable, supra,* to invalidate an issued patent.

There is a new document offered in this connection that is especially pertinent. In the motion and petition for leave to file as new matter, on page 26, attention is called to the long table, etc., in the testimony of Melville E. Dunkley. He says as to the long table of 1903:

> "I don't think I meant to infer that at all, but my mind was upon the machine which was—or the inspection table and the filling table which was there in 1904."

Further down on the same page he is quoted as answering:

> "Both parts of that table were cut in half in 1904, both the part with the conveyor belt in the middle and the slat filling part, was cut in two

> with an idea of installing two lines with the peelers."

And he answers as to the 1903 season and table:

> "I should say yes, sir. I don't remember that it was not; that is what it was put in there for. I don't know but what it was."

Then the testimony of S. J. Dunkley is referred to about this long table, and at (p. 29) the language of Judge Trippett is quoted for the special consideration of this Court at this time, where he said:

> "The construction of this table, and the existence thereof, in the peach season of 1903, is utterly inconsistent with the theory of plaintiff's case."

This shows how completely he had been misled by the argument of defendants' counsel, because they now produce the documentary proofs sustaining the plaintiff's position to the contrary. The matter now produced is quoted at length at page 33 of the printed petition, where it says in April, 1904, considering the inside:

> "Important changes are being made in the machinery which is under the direction of Stewart Campbell, who is the inventor of two new machines to be used for the first time this season, a pitting machine and a paring machine. *Two* of each will be put in, as *they are building an additional paring table 110 feet long.*"

We therefore have the document showing that these things were in progress and that not only is it not inconsistent with the presence of the Dunkley peeling machine to have a paring table present, but that one was

actually in process of construction 110 feet long in 1904, when there were two such paring machines to be installed.

This article was written in April, 1904. It shows what was in progress, and we submit that if the machine had not been tested out so that the Dunkley Company absolutely knew it was a commercial success, it would not have been warranted in reorganizing on this extensive basis. Prudent manufacturers do not do business that way.

This confirms plaintiff's position, that the machine had been commercially tested and used the year before, and it is supported by the Norton correspondence and Mr. S. J. Dunkley's testimony, which was refreshed by the documents, as to which documents there is not any question, because they were offered in evidence by defendants themselves. Judge Van Fleet says in his opinion, page 288 of Record 3824:

> "Indeed, I regard the item referred to as the 'Norton letters,' to which much significance is attached, as making, in their sequence, when properly construed, entirely in favor of the plaintiff."

Fifth—The merits of this whole matter support Dunkley's position, and particularly is Dunkley's patent supported by the documentary proofs offered herein.

Dunkley's proofs in support of his invention are elaborately considered in the brief for plaintiffs-appellants in this court in the case of *Dunkley Co. and Michigan Canning & Machinery Co. plaintiffs- appellants, v. Pasadena Canning Co. and George E. Grier, defendants-appellees, No. 3316,* beginning at page 51 of the brief to page 172.

There appears in that record not only that the patent has been duly issued but there is the undisputed testimony as to the development of the invention. The frame of the first machine is produced. The witnesses on behalf of Dunkley are:

Abe Verhage (R. p. 3992), who assisted in the construction and operation of the machine, beginning in 1902, and operating the same under commercial conditions in 1903. He identified the framework of the precise old machine.

Mrs. Verhage, his wife, testified to the same matter (R. p. 4017).

John A. Wiers (R. p. 4036), testified to the same matter.

Mrs. Mace (R. p. 4198), testified to much the same matter, and to correspondence relative to the samples of fruit put up in 1902, identifying correspondence with the chemical department of the University of Michigan.

These witnesses were all in support of the testimony of S. J. Dunkley, two testified in detail on the whole subject, and his son Melville E. Dunkley, who testified fully on the whole subject, and the testimony of Mrs. Carrie Wing-Easterbrook.

Mrs. Easterbrook was called by defendants in the Pasadena case and testified at great length (R. p. 320), being cross examined by defendants and giving the early history without any question, having a very clear recollection of it. She is the sister-in-law of Samuel J. Dunkley.

C. D. Crary (R. p. 295), a witness for defendants, remembered the old machine in December, 1902.

The frame of the old machine itself has been preserved and has been identified by all of these witnesses (except Crary) and by Harvey Schau, who testified in the instant cause as having seen the same in the fall of 1902. Mr. S. J. Dunkley refreshed his recollection particularly by the Norton correspondence, which is referred to particularly by Judge Van Fleet in his decision at page 279 of the record in this case, No. 3824.

This Norton correspondence is elaborately considered in the brief for plaintiffs in *Dunkley Co. v. Pasadena Canning Co.,* from pages 57 to 67, to which we refer for detailed consideration.

We mention here briefly and rapidly a letter from Edwin Norton to Dunkley, dated October 23, 1903, where the visit of Arthur Norton and Melville Dunkley is mentioned and where Norton says:

> "Their description of the perfect working of the *peeling* and grading machines for peaches are very interesting."

Mr. Dunkley replied October 29, 1903 (R. p. 4124):

> "The South Haven factory is now closed up and we have been working this week on a peach pitter, and Mr. Campbell has already got out the working parts and I think we have it so that it will halve and pit the peaches nicely and quickly *from the peeler.*"

He then refers to "The Canner and Packer," which is a means of absolutely fixing the date, and mentions that he would like to cover the machine with patents. On November 7, 1903, Dunkley wrote:

> "We are busy working on a *new* paring machine and we have got up a pitting machine."

On February 10, 1904 (R. p. 4128), Dunkley wrote:

> "We have made our prices so as to get volume of business."

He refers in the same letter to the machine being made by Campbell, saying:

> "This we are sure will work as we worked the same thing last year and there is no question about it."

and followed:

> "We have the peach pitter nearly ready to assemble, and Mr. Campbell is very sure that this will work, though if it does not we have figured it will only cost us 3 cents per dozen to halve the peaches and pit them by other methods."

There is a letter from Norton to Dunkley, dated March 8, 1904, saying:

> "I know Mr. Campbell must have his hands full with 'Annanias' and the other machines."

On March 9, 1904, Dunkley wrote Norton (R. p. 4103):

> "Mr. Campbell has the peach pitter almost done."

and adds:

> "The prevaricator is set up and very nearly completed and is a nice machine."

Dunkley says in a letter of March 28, 1904, to Norton:

> "We must also bear in mind that we are now working under different conditions, as the labor-saving machines we are now putting in enables us to put our pack of goods on the market at popular prices."

On April 7, 1904, he writes:

> "The peach pitters are complete and will split an apple all right."

On June 2, 1904, Dunkley wrote (R. p. 4149):

> "I have just heard from Georgia that early peaches are now coming on and they expect to have free stones in about ten days, and then we can try our *pitting* machine."

No need, of course, to try the peeling machine, because that had been operated the year before.

Plaintiff then shows correspondence with Courtney, as he had become discouraged about Campbell's pitting machine, and Norton wrote on June 8, 1904 (R. p. 4153):

> "As the market here is full of early peaches I suppose you will soon be able to secure sufficient supply to make a real test of our 'Annanias' and the pitting machine."

showing that the spray part of the machine was not a part needing consideration. On June 16, 1904, Dunkley wrote to Norton (R. p. 4155):

> "We have not been able to make a test of the *pitting* machine as yet but expect to get peaches next week to do so."

On August 5, 1904, Dunkley wrote to Norton (R. p. 4159):

> "In regard to fitting over the cherry pitters to pit the soft peaches would say I have gotten something better in my Kalamazoo peach pitter, which will pit a soft peach in fine shape."

He says:

> "We have just received some peaches from Chicago today and are putting them through."

On August 19, 1904, Dunkley wrote Norton (R. p. 4161), saying:

> "The prevaricator (the special form of tank built for the lye peeling machine) has been tested and is all right *as well as* the rotarys, and Campbell has made new knives for his two pitters and expect they will work fine on firm fruit. I have completed the peach pitter and the kind here at South Haven ready to run automatically that will do from 80 to 100 bushels per day, ten hours, and will have five more delivered by September 1st."

We are very clear that this sequence of correspondence entirely warranted Judge Van Fleet's statement that it made for the plaintiff's case and is certainly full documentary proof and abundantly supported by matter appearing on page 33 of the printed petition herein, where the "Improvements to the Canning Factory" are referred to in the Tribune-Messenger of April 22, 1904. It is there pointed out that "two new machines are to be used for the first time this season, a pitting machine and a paring machine. Two of each will be put in as they are building an additional *paring table 110 feet* long." For a full discussion of all details, we refer to our brief in the Pasadena case.

Sixth—The Dunkley patent has the prestige of an issued patent, and is adjudicated and supported by undisputed testimony of a large number of unimpeachable witnesses, whose testimony is confirmed and supported by all the pertinent documentary proofs in this case.

Dunkley has the prestige of an issued patent, and this has been held sufficient, as pointed out in many cases *supra,* to protect him against attack by mere oral testimony as to events long past.

The Dunkley patent, however, is not the usual patent granted on an *ex parte* proceeding. Dunkley encountered an interference in the Patent Office with one Beekhuis, which interference was hotly contested. It involved distinctly the question of priority and of invention. There was a complete showing therein as to the

prior art, and a complete statement by Beekhuis of what had gone before in the securing of his patent, which patent was afterward put into interference with Dunkley.

After a protracted contest and complete proofs, the Court of Appeals for the District of Columbia decided the controversy in favor of Dunkley, and they said as a result of their thorough and careful consideration:

> "Dunkley was the first to invent and put into practice a rapid and effective machine for peeling peaches."

There has been no testimony offered since of a different character than that which was submitted in the interference, and thus considered by that court as supporting their finding.

The Beekhuis patent was owned by the California Fruit Canners' Association, who abandoned the Vernon device in favor of it. Both Beekhuis and Vernon were submitted in the trial of this case before Judge Van Fleet, and all matters were fully considered by him. An appeal was taken to this court and this court carefully reviewed the whole matter in an opinion rendered by Morrow, Circuit Judge, reported in 247 Federal 790. Considering the Beekhuis matter and the decision of the Court of Appeals of the District of Columbia, this court said:

> "We see no reason for reversing this decision, after a careful reading of the testimony."

Therefore the decision of the Court of Appeals for the District of Columbia, that

> "Dunkley was the first to invent and put into practice a rapid and effective machine for peeling peaches"

has the approval of this court.

There were three other matters of anticipation particularly urged, as pointed out by Judge Van Fleet: The Vernon device, which, as stated above, was abandoned by the California Fruit Canners' Association for the Beekhuis; the Grier device which was not patented and as to which there was only oral testimony, the Grier device being held to be an infringement of Dunkley; and there was the testimony of Stewart Campbell, which was mere oral testimony of events long past, of which Judge Van Fleet stated:

> "I could not extend the limits of my credulity sufficiently to put credence in the testimony of Campbell."

These matters of anticipation were each definitely considered by this court, as pointed out in 247 Fed. Rep. at pages 792-3-4.

We have therefore three tribunals upholding the Dunkley patent. After this concurrence there have been two decisions by district judges to the contrary, both of which were reviewed by Court of Appeals which did not find it necessary, in disposing of the cases, to consider the questions of validity and scope of the patent:

First: The decision of this court in *Dunkley v. Pasadena Canning Co. and Grier,* reported at 261 Fed. 386, where Judge Rudkin stated at page 387:

> "But in the view we take of the case it is only necessary for us to consider the question of infringement."

The court said further:

> "The Grier machine or device then before the court is not involved in the present case."

quoting with approval the previous finding of this court that the Grier device then before the court was anticipated by Dunkley.

Second: The case by the Circuit Court of Appeals for the Second Circuit, which held that the defendant, California Packing Corporation, was licensed, reported at 277 Fed. 996. The court said at page 1001:

> "We need not go further and consider the *validity* and *scope* of the Dunkley patents. On this point we express no opinion, * * *."

Judge Van Fleet has carefully considered the decisions of the district judges in these cases, and was constrained to insist that his original views were right and should not be influenced by matters which he finds presented to the other district courts. He points out in 277 Fed. Rep. at page 1002, that these matters were before him and both had been considered on appeal at that time, and he says at page 1005 (page 287 of the record herein, No. 3824):

> "I have taken pains, with the aid of a very complete index memorandum furnished by counsel, not only to carefully review the evidence introduced before me but everything additional found in the records in both *Dunkley v. Pasadena Canning Co.* and *Dunkley v. California Packing*

> *Corporation,* presented for the first time before Judge Trippett in the former case and later to Judge Hand in the latter; and in my consideration of the evidence I have had the benefit of the views and comments found in the opinions of both my learned brothers, which led them to an opposite conclusion with myself as to the validity of the patent, yet nevertheless, I am constrained to say, that with the highest consideration for the learning and ability of both, I am impressed with neither the character of the new evidence nor with the conclusions reached in those cases."

He then comments:

> "That there was a cloud of 'new' witnesses it is quite true, giving indication that the country had been raked with a fine-toothed comb, so to speak; but there was little new evidence given by them—if the term be used to express the idea of material evidence."

He points out his conclusion, as already quoted, that the testimony is unsupported oral testimony, not proper to be considered in invalidating a patent, and particularly ought it not to be considered when a patent was obtained after a hotly contested interference, and has been upheld on substantially the same record repeatedly by courts of last resort.

Defendants cannot refer to any documentary proofs in support of their position. Plaintiff has already pointed out the extensive documentary proofs in support of its testimony, and it has the old machine itself, so that plaintiff's testimony is supported by documents and a structure unquestionably the original machine manufactured.

The defendants have attacked the testimony of Melville Dunkley and of Samuel J. Dunkley at the present time, as unwarranted, and they produce now a final document, a newspaper article published in April, 1904, which supports the position of plaintiff completely. It shows that Melville Dunkley and S. J. Dunkley were right when they said that two lines of machines were contemplated in the spring of 1904. This newspaper article, quoted at page 33 of the printed petition, says:

> "Two new machines to be used for the first time this season, a pitting machine and a paring machine. Two of each will be put in, as they are building an additional paring table 110 feet long."

showing a long paring table being installed in the year 1904, precisely as stated by Melville Dunkley, who was attacked for making such a statement. Therefore the documents here submitted entirely support the testimony attacked, and show that Judge Trippett was misled into saying that the presence of a parng table in 1903 or at any time, was inconsistent with the presence of the Dunkley peeling machine. There was another such paring table being made when two Dunkley machines were to be installed.

There is not the slightest reason for considering any document for the reopening of this case or for permitting the defendants to file an original bill in the nature of a bill of review. There is nothing in the merits of the case presented by them. They certainly have not been diligent, for they have delayed three years, and it is no excuse to say that they applied to Judge Van Fleet and therefore should be given credit for that. Judge Van Fleet has passed on the merits adversly. If

it was any part of their duty to apply to this Court, it certainly was their duty all the time, and they have not complied with that.

But why should this Court now direct that the application be repeated to Judge Van Fleet. He has already considered the merits and found against defendants. And in any event the filing of an original bill in the nature of a bill of review is not a matter of right, and should only be permitted if a meritorious showing had been made, which has not been done by defendants; nor has there been any explanation of substantially three years delay.

The motion and petition, we respectfully submit, should be denied as untimely and wholly without merit.

Respectfully submitted,

Fred L. Chappell,
W. A. Richardson,
Counsel for Appellees.

No. 3824

In The

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CENTRAL CALIFORNIA CANNERIES COMPANY, GRIFFIN & SKELLEY COMPANY, J. C. AINSLEY PACKING COMPANY, ANDERSON-BARNGROVER MANUFACTURING COMPANY, GOLDEN GATE PACKING COMPANY, J. F. PYLE & SON, INC., HUNT BROTHERS COMPANY, SUNLIT FRUIT COMPANY,

Appellants,

v.

DUNKLEY COMPANY (now known as Michigan Canning & Machinery Company) and DUNKLEY COMPANY,

Appellees.

BRIEF FOR PLAINTIFFS-APPELLEES ON DEFENDANTS' APPEALS AND ON PLAINTIFFS' MOTION TO DISMISS THE APPEALS.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3824.

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GRIFFIN & SKELLEY COMPANY,
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Appellees.

BRIEF FOR PLAINTIFFS - APPELLEES ON DEFENDANTS' APPEALS AND ON PLAINTIFFS' MOTION TO DISMISS THE APPEALS.

It has been stipulated herein that the appellees' motion to dismiss the appeals might be argued at the same

date and independently of the appeals herein, but it is believed that the whole matter can be submitted in this brief and the matter brought to the attention of the court in such a way that the same will be completely and best considered in this way.

The appeals herein are identical and the orders allowing the appeals appear at record pages 298, 304, 310, 316, 322, 328, 334 and 340 respectively. Each order recites:

> "It is ordered that an appeal be and the same is hereby allowed the defendant * * * from the order made, filed and entered herein on August 22nd, 1921, *allowing and granting plaintiff's motion that Dunkley Company be made or added as a party plaintiff herein.*"

The petitions for the appeals follow the orders in each instance and embrace a *petition* for appeal from the order *denying* defendants' motion to reopen, as well as from the order granting the motion of plaintiff.

It will be observed that there is nothing in the orders allowing appeals from the order denying defendants' motion to reopen; so that the matter of reopening the cases on defendants' motion is not before this court.

The defendants' assignments of error, identical in each case, are at record pages 301, 307, 313, 319, 325, 331, 337 and 343 respectively. The first and seventh assignments in each case assign error because of the granting of *plaintiff's motion* to add new party.

The remaining assignments relate to defendants' motion which appeal was not allowed. The second assign-

ment is because of error in denying *defendants' motion* to reopen, and the third, fourth, fifth, sixth and eighth assignments pertain to matters appearing in defendants' said motion.

It is therefore clear that there is no appeal allowed from the defendants' motion to reopen, and the assignments pertaining to defendants' said motion are wholly improper and not to be considered here.

All of the printed record from pages 10 to 296 inclusive pertains to defendants' motion and needs no consideration in this brief, and the exhibits from pages 399 to 484 are all presented in connection with defendants' motion and consequently not properly before this court.

Plaintiffs' motion to add the new party plaintiff appears at record page 2. It recites fully the facts in that behalf, and the prayer at record page 4 is that

> "plaintiff prays that the said new Dunkley Company may be made party plaintiff herein, as it is the chief party in interest and is this plaintiff after reincorporation with increased capital stock."

There is also at record page 4 the prayer of the new Dunkley Company, above referred to, which prays

> "that it may be made a party plaintiff herein, and that it may be substituted in the place of the Dunkley Company herein, having acquired the rights thereof by proper legal assignments and being the said company after the reincorporation proceedings referred to above."

The order appealed from is at record page 297, and recites that

> "the court having filed its written opinion, it is ordered that said motion to reopen the decree be and the same is hereby denied and that the motion to add new party plaintiff be and the same is hereby granted."

This court in issuing its mandate in the main case, being fully advised of the facts, particularly granted leave to the plaintiff to move for the addition of the new party plaintiff, and plaintiffs' motion, at record page 2, recites that the motion is made pursuant to permission given in the mandate of the United States Circuit Court of Appeals.

This court made an order to that effect on Monday, the 20th day of May, 1918. The order denied defendants' motion and directed that

> "the mandate of this court is hereby directed to issue without prejudice to the right of the plaintiffs-appellees herein to apply to the District Court for leave to make the Dunkley Company or such other corporation or persons as plaintiffs-appellees may contend is or are necessary parties plaintiff to the action."

The full language of the order, showing the denial of defendants-appellants' motion as well, is as follows:

> "The motion of the defendants-appellants filed in this court on the 1st day of May, 1918, for orders, and submitted for consideration on the 6th day of May, A. D. 1918, vacating the decree heretofore rendered by this court affirming the

> interlocutory decree of the District Court for the Southern Division of the Northern District of California made on the 8th day of December, A. D. 1916, and the order of submission for decision made and entered by said District Court on December 8, 1916, and for other relief as included in the aforesaid motion, denied, and the mandate of this court is hereby directed to issue without prejudice to the right of the plaintiffs-appellees herein to apply to the District Court for leave to make the Dunkley Company or such other corporation or persons as plaintiffs-appellees may contend is or are proper or necessary party plaintiffs to the action."

The said mandate was issued accordingly.

It will be seen, therefore, that this amendment was made by permission of this court and the party added pursuant to the permission and leave of this court, and that the mandate of the court was in no way departed from by the learned trial judge. There is therefore nothing to be submitted to this court on this appeal for its consideration. All has been considered and decided.

This court had also in the original appeal, it will be noted at record page 297, thus refused to modify its mandate in any way on defendants' motion, where the same matter was submitted that was submitted in the defendants' motion that was denied, as to which petition for appeal was made and no appeal was granted or allowed by the trial court. The only question that could be raised is whether or not the District Court has failed to comply with the mandate and order of this

court. And it has not failed. The court has complied in all particulars.

It will be noted that the petitions for appeal in each of the cases recite that the defendants are

> "aggrieved by the *interlocutory* order or decree made, filed and entered in the above entitled suit on August 22nd, 1921."

It will be noted that the plaintiff in no way made any motion relative to the injunctive relief, but has simply added a party.

Equity Rule 37 of the United States Supreme Court recites:

> "Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause."

The new Dunkley Company has simply been added as a party at the time indicated by the order, August 22, 1921. This court had graciously indicated that its mandate was without prejudice to the right of the plaintiff to do this thing provided for by the rule.

The decree of the court still remains interlocutory, and this order appealed from is interlocutory and is not an appealable order. This appears from consideration of Section 129 of the Judicial Code, which is the clause permitting appeals from decrees other than final.

It is therefore very clear that there is nothing submitted on this appeal from the interlocutory order adding the party plaintiff that is proper to be considered by this court. The matter has been previously determined

by this court so far as it could be proper to be considered in this behalf. Anything reviewable by this court should await an appeal from a final decree.

Defendants-appellants' appeals should be dismissed.

Respectfully submitted,

Fred L. Chappell,
W. A. Richardson,
Counsel for Appellees.

No. 3824

In The

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CENTRAL CALIFORNIA CANNERIES CO., GRIFFIN & SKELLEY COMPANY, J. C. AINSLEY PACKING COMPANY, ANDERSON-BARNGROVER MANFG. CO., J. F. PYLE & SON, INC., HUNT BROTHERS COMPANY, SUNLIT FRUIT COMPANY,

Appellants,

v.

DUNKLEY COMPANY (now known as Michigan Canning & Machinery Company) and DUNKLEY COMPANY,

Appellees.

REPLY BRIEF FOR PLAINTIFF-APPELLEES TO DEFENDANTS-APPELLANTS' POINTS AND AUTHORITIES ON PETITION FOR LEAVE TO FILE AN ORIGINAL BILL IN THE NATURE OF A BILL OF REVIEW.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3824.

CENTRAL CALIFORNIA CANNERIES CO.,
Appellant,

GRIFFIN & SKELLEY COMPANY,
Appellant,

J. C. AINSLEY PACKING COMPANY,
Appellant,

ANDERSON-BARNGROVER MANFG. CO.,
Appellant,

GOLDEN GATE PACKING COMPANY,
Appellant,

J. F. PYLE & SON, INC.,
Appellant,

HUNT BROTHERS COMPANY,
Appellant,

SUNLIT FRUIT COMPANY,
Appellant,

v.

DUNKLEY COMPANY (now known as Michigan Canning & Machinery Company) and DUNKLEY COMPANY,
Appellees.

REPLY BRIEF FOR PLAINTIFF TO DEFENDANTS-APPELLANTS' POINTS AND AUTHORITIES ON PETITION FOR LEAVE TO FILE AN ORIGINAL BILL IN THE NATURE OF A BILL OF REVIEW.

As probably being most expeditious it is our purpose to consider defendants-petitioners' brief in the order in

which the matters are presented. We do this, notwithstanding that it apparently presents technical grounds first.

Defendants-petitioners' showing is wholly without merit, as has been pointed out very authoritatively by Judge Van Fleet in his opinion in Record No. 3824, pages 279-301 inclusive. Defendants have produced no document, no article, nor anything other than the oral testimony, without any support, based on the memory of the witnesses as to matters fifteen years past.

Judge Van Fleet points out that such testimony does not comply with the Supreme Court rule as to matters of evidence which should be regarded an anticipating an existing patent, referring to *Symington v. National Malleable, 250 U. S. 383, at 386,* the latest word of that court on the subject, affirming very old and recognized law.

With this preliminary statement, we will consider the defendants-petitioners' brief on the motion page by page and title by title.

The *"Statement" at page 4* is strikingly erroneous. It says first that "The invalidity of the Dunkley patent has already been decreed by this court." Counsel should know better than to make such an assertion.

In this very case this court has upheld the Dunkley patent and sent down its peremptory mandate after considering defendants' petition to set aside the decrees. See *Central California Canneries v. Dunkley, 247 Fed.*

790, and the mandate and the order of court herein denying defendants' motion and indicating that its mandate should be without prejudice to the plaintiff to add a new party.

In the Pasadena case, this court in its opinion *(Dunkley v. Pasadena, 261 Fed. 386),* beginning bottom line of page 386, states:

> "The court below found against the appellants on each of these several propositions, but in the view we take of the case it is only necessary for us to consider the question of infringement; for, assuming that the decision in that case" (meaning the decision in the case at bar, reported in 247 Fed. 790) "should be followed here and is binding upon the appellees, the question of infringement was not there involved, because the Grier machine or device then before the court is not involved in the present case."

The court then quoted with approval from its decision in the instant case. The patent was thus distinctly upheld.

On the petition and motion to modify the mandate in the Pasadena case, this court denied the motion and remarked that the judge rendering the opinion might care to change the particular matter quoted above but that judge made no change in it, and allowed it to stand as reported, and it stands as the final word of this court. Therefore the decision in no way affects the validity and scope of the Dunkley patent, as it was not passed upon further than to hold that a device which does not contain a spray does not infringe.

The *"Statement" of petitioners' brief* says, secondly, that "In any event plaintiff herein has in subsequent litigations so changed its testimony, etc., that the showing made in behalf of the patentee is under the law and the decisions legally insufficient to sustain the validity of the patent."

We wish most emphatically to deny this aspersion. The plaintiff has in no way changed its testimony in any particular. It has no desire to change its testimony in any particular. It does not need to change its testimony in any particular. And the testimony has supported the Dunkley patent from the very beginning, as is evidenced by the language of the Court of Appeals for the District of Columbia in granting the patent, after a most vicious and unwarranted contest and attack, that court saying:

> "Dunkley is the first to invent and put into practice a rapid and effective machine for peeling peaches."

That statement was predicated on as complete a record, so far as facts are concerned, as has been produced at any time in any of the subsequent litigation or by the testimony of either plaintiff or defendants.

This court approved specifically the finding of the Court of Appeals for the District of Columbia, saying in 247 Federal at 792:

> "We see no reason for reversing this decision, after a careful reading of the testimony."

and in the opinion of this court in *Dunkley v. Pasadena, 261 Federal 386,* this court quoted its former opinion

with approval at page 387, and did not hold the Dunkley patent invalid or disturb its former finding.

The Court of Appeals in New York did not affirm the District Court, Judge Hand's finding of invalidity, but stated that that question was not before them, saying (277 Fed. Rep.) at page 1001:

> "We need not go further and consider the validity and scope of Dunkley's patents. On this point we express no opinion, but affirm the decree below *on the sole ground of license.*"

These decisions of the Courts of Appeals control the decisions of Judge Trippett and Judge Hand, making their expression of opinion *obiter* and of no force. It is therefore clear that the Dunkley patent has not been decreed invalid anywhere, and it is strongly supported by all decisions and decrees where that question has been involved and considered.

We regret the necessity of constantly being called upon to correct the misstatements made by counsel for the defendants in these matters.

Page 5, "Procedure": We call particular attention to the authority cited by petitioners as supporting their position, *John Simmons v. Grier Bros. Co.,* decided by the Supreme Court February 27, 1922, and reported in the Advance Sheets of the Lawyers Co-operative Publishing Company April 1, 1922, at page 268.

In that case Mr. Justice Pitney, speaking for the court, points out at the end of page 271:

> "The decree of July 24, 1914, although following a 'final hearing,' *was not a final decree.* It granted to plaintiffs a permanent injunction upon both grounds, but an accounting was necessary to bring the suit to a conclusion upon the merits. An appeal taken to the circuit court of appeals, whose jurisdiction, under Section 129 Judicial Code, extended to the revision of interlocutory decrees granting injunction, followed by the decision of that court reversing in part and affirming in part, did not result in a decree more final than the one reviewed. * * * There was nothing to take the case out of the ordinary rule that *there can be but one final decree in a suit in equity.* * * *"
>
> "As the decree in question was entered pursuant to the mandate of an appellate court, proper deference to its authority required that a proceeding to reopen it, whether by rehearing or review, should be first referred to that tribunal."

The defendants in the instant cause applied to this tribunal before the mandate was sent down. The Supreme Court in the Simmons case, after citing authority, said:

> "That having been done in this case, and leave for the purpose obtained (leave to grant a 'review' fairly included any step short of that), what obstacle stood in the way of correcting the decree? The suit was still pending; plaintiffs applied promptly after the decision of this court in the *Abercrombie & F. Co. suit, 245 U. S. 198, 62 L. Ed. 240, 38 Sup. Ct. Rep. 104.*"

The court then said, page 273, after further consideration:

> "afforded ample ground for setting matters right upon a *rehearing* before final decree, as was in effect done by the district court."

Therefore, the petition in the instant cause, as it is made before the entry of final decree, is only to be regarded as a petition for a rehearing, and it has been presented to this court in a former petition to rehear on the record, and later by motions to set aside the decrees which were denied just previous to sending down of the peremptory mandate, and thereafter by an application to Judge Van Fleet, who has in detail passed upon the merits and also pointed out that the petition was not timely. All of these matters, if the defendants have any rights, are capable or review herein on appeal in the case after final decree. No final decree has been entered. The interlocutory decree is not reviewable as we have pointed out, in the appeal herein because this appeal was premature from an interlocutory order and not from a final decree.

It appears that the merits of the whole matter have been submitted to and been passed upon by the District Judge. It is not proper to be considered here at the present time and in the present manner.

The Supreme Court, in *Simmons v. Grier, supra*, points out that the matter is, until the decree becomes final, merely a petition to rehear. The matters have all been submitted herein time and again on that basis. They are not proper to be reviewed here because they do not come within the provision of the statute granting appeals. The matter is already before the court below and held insufficient on interlocutory order. A final decree may sometime be entered when the matter can be considered by this court for what it is worth, both on the merits and on proper procedure. Under the new equity rules, however, the procedure is very elastic.

Page 6, "Litigation over Dunkley Patent": This is also misstated. We will merely recite the decisions showing what was decided in each:

(A) Decision of the Court of Appeals of the District of Columbia, in *Dunkley v. Keekhuis, 190 O. G. 267, 39 App. D. C. 494,* holding on a full record:

> "Dunkley was the first to invent and put into practice a rapid and effective machine for peeling peaches."

(B) Decision of Judge Van Fleet herein (not reported, printed in Record No. 2915, page 696), after a five-day trial upholding the Dunkley patent, approving the decision of the Court of Appeals of the District of Columbia and construing the Dunkley patent broadly.

(C) Decision of this court, 247 Fed. 790, affirming Judge Van Fleet's decision and specifically considering and approving the Court of Appeals of the District of Columbia.

(D) Decision of Judge Trippett in *Dunkley v. Pasadena, 261 Fed. 203,* holding (1) the Dunkley patent bad and (2) holding non-infringement.

(E) Decision of this court in *Dunkley v. Pasadena, 261 Fed. 386,* affirming the decision of Judge Trippett on the ground that "it is only necessary for us to consider the question of infringement"; quoting and approving the first decision of this court and not considering the merits of the patent as to the spray or its equivalent.

(F) Decision of Judge Hand in the New York case, *Dunkley v. California Packing Corporation, 277 Fed. 989,* which (1) followed Judge Trippett in holding the Dunkley patent bad and also (2) holding that the defendant there was a licensee.

(G) Decision of the Court of Appeals of the Second Circuit, 277 Fed. 996, which affirmed "the decree below on the sole ground of license" and "on the validity and scope of Dunkley's patents express no opinion."

(H) Decision of Judge Van Fleet herein, denying the petition for a request to this court to withdraw its mandate, 277 Fed. 1001. Judge Van Fleet pointed out the errors of Judge Trippett and Judge Hand and reaffirmed his decision herein, stating that the defendants had in no way complied with the rule of *Symington v. National Malleable, 250 U. S. 383.*

From this recitation of decisions, the misstatement of the situation by petitioners' counsel clearly appears, and we will not discuss the same further than it is incidentally touched upon in other phases of this reply. We refer particularly to the succinct statements of Judge Van Fleet's opinion at 277 Fed. 1001, and in Record No. 3824, page 279, reviewing the entire matter.

Page 9, "General Considerations Bearing upon the Underlying Equities of these Applications":

1. It is true that Judge Trippett and Judge Hand have in opinions held the Dunkley patent to be invalid, but on appeals neither of these decisions were affirmed on these grounds. This court pointed out in the Pasa-

dena case that this question was not before it and held non-infringement, and the Court of Appeals for the Second Circuit on appeal from Judge Hand distinctly stated that they would "express no opinion on the validity and scope of the Dunkley patents" but affirmed the decision "solely on the ground of license." The statements of Judge Trippett and Judge Hand are *obiter* and not decrees.

2. The new and additional evidence that is said to have been before Judge Trippett and Judge Hand has been ably and completely and authoritatively discussed by Judge Van Fleet in his opinion herein. He stated the matter so fully that we simply refer to that opinion as a most concise and authoritative statement without repeating it here. We consider the matter later more in detail.

3. There is no new and additional evidence supporting the defendants' case that is of an equivocal character, and there has been no vital *change* of testimony by the two Dunkleys. There is a considerable amount of documentary proof now appearing which fully supports Dunkley's position. The newspaper article of April 22, 1904, shows a paring table being built in the year 1904, as pointed out in Melville Dunkley's testimony. There never was any question about there being the long paring table at the plant of the Dunkley Company in 1903 and prior thereto, because a photograph of it was offered in evidence before this court and it appears in the original record herein, No. 2915, at page 911, which was before this court. This was offered by defendants in sur-rebuttal testimony, and the plaintiff accepted it

without offering one syllable of testimony to the contrary, and never questioned its existence. The location of that table is correctly indicated in Defendants' Exhibit T, page 902 of original record herein, No. 2915.

As to documentary proofs, the plaintiff has produced the framework of the original machine of 1902, which we submit is superior to any mere picture or description of it, and it has been proven by a long list of witnesses.

4. The "curious and peculiar equities here presented," considering the language of this court in applying the rule "*Falsus in uno, falsus in omnibus,*" in its opinion in the main decision herein, is quite remarkable. The language of this court to which we refer is in 247 Fed. Rep., bottom of page 793, where this court was considering the testimony of Stewart Campbell, saying:

> "If Campbell's testimony was not true, he was testifying falsely concerning a material and relevant matter, and his testimony would for that reason be wholly rejected. '*Falsus in uno, falsus in omnibus*'."

It is but a reflection upon the entire testimony of Stewart Campbell by this court after considering his testimony in this case and the opinion of Judge Van Fleet upon it. Yet, notwithstanding the stricture, we find Stewart Campbell relied upon by Judge Trippett, 261 Fed. at page 208, saying:

> "It is proper that the court should *notice especially* the testimony of Stewart Campbell."

Saying at page 209, end of fraction of paragraph at top of page:

> "There is no reason in any event for discrediting Campbell's story."

Yet Judge Trippett was considering the very testimony that had been passed upon by this court, and considering the rejected testimony of this very witness whom this court had found to be a falsifier—whether deliberate or otherwise is not material.

We have the feeling that the consideration of Stewart Campbell's testimony will show that he was mentally disturbed, for his prejudices are most astonishing and unaccountable, and as to his statement we believe Judge Van Fleet was entirely warranted in saying he "could not extend the limits of his credulity sufficiently to put credence in it."

The proposition or rule of "*Falsus in uno, falsus in omnibus*" still certainly applies, so far as Campbell is concerned, and his is the foundation of the testimony on which the Dunkleys are attacked. All other testimony could be regarded, if it is of any weight, as merely corroboratory. It is merely oral, without documentary or other support.

5. (Page 10.) The evidence does go into detail. The language of Judge Trippett just quoted shows that he depended upon Stewart Campbell as his main support, and the language of Judge Hand is not capable of any different consideration. The language of Judge Hand to which we particularly refer is at 277 Fed., page 993, where he says:

> "Judge Trippett has discussed this testimony carefully and has reached the conclusion that

> Stewart's testimony that he made the first machine in 1903 is correct."

(Stewart's meaning Stewart Campbell.) This shows that Judge Hand after this court in rejecting Campbell's testimony had pointed out and applied the rule of "*Falsus in uno, falsus in omnibus*" to Stewart Campbell's testimony, gave it his brand of approval, notwithstanding the finding of this court was but an affirmance of the finding of Judge Van Fleet, who heard Stewart Campbell testify in the first instance before there had been opportunity to coach him in the details.

It is therefore most astonishing that the petitioners-defendants herein should now suggest that because of this same rejected testimony of Stewart Campbell, the testimony of plaintiff should be found false, and the rule should be applied to it. The rule still continues applicable to Stewart Campbell's testimony, which is the backbone of defendants' case.

The matter of the decisions of Judge Trippett and Judge Hand, urged in defendants' fifth paragraph is certainly discredited by the previous application of the rule of "*Falsus in uno, falsus in omnibus*" made by this court.

Page 11, "New matter analyzed": The new matter does not bear. There is in fact no new matter about it.

2. (Page 12.) The Dunkley-Norton correspondence supports Dunkley's position (discussed under a later head).

3. The Dunkley pay rolls are documents tending to support the Dunkley position (discussed later herein).

4. The newspaper article of April 22, 1904, completely supports Dunkley's position, and shows that a new paring table 110 feet long was being put in in 1904 and that two lines of machinery were being installed, a matter wholly inconsistent if there had been but a mere brief test of the machine the year before, as claimed by defendants. The facts conform to the Dunkley testimony.

5. The large amount of testimony referred to is merely oral statement, unsupported by documents, of events long past.

Page 15, "The proofs on behalf of Dunkley are now legally insufficient to sustain the patent": The proofs abundantly support Dunkley's position and story in this behalf. The record does not bear out defendants' contention. We do not deem it necessary to discuss the long list of authorities under this heading, as they cannot assist the court in reaching a different conclusion than the one it has already expressed in this case.

Page 40, "The case at bar as now made out by new evidence": We can only say that any additional proofs in this case supported by any documents support plaintiff's position.

Page 48, "New matter set up in Paragraph IV of the petition; its materiality and effect": We are not particularly interested in the statement of Mr. John H. Miller,

counsel, because that statement was made without his being fully familiar with the whole situation.

Page 50, "1 Clark letter incident": A reference to the original record No. 2915 shows how this letter was introduced. It came in connection with the testimony of Melville Dunkley. At Record page 461 Melville Dunkley was asked:

> "Did the Clark Engine & Boiler Co. deliver to your factory in Kalamazoo about January 30, 1904, a tank, a lye tank?
> A. That I could not remember."

Dunkley produced the letter, Record page 466-7, and quotes the letter saying:

> "In reply to your favor of the 21st we regret that there should be any disappointment in the cost of the tank."

An invoice was produced, bottom of Record page 467, and Mr. Lyon said:

> "We object on the ground that the invoice produced by the witness is incompetent, no foundation laid. It is not the original, not shown to be a true copy."

After discussion the Court said page 468:

> "The letter may be admitted in connection with the witness's statement *without the invoice.*"

The letter was objected to at page 463 and the witness said:

> "It is a letter which I found regarding what we suppose, that we thought was an over charge on the first experimental tank which was built for us or of which the shell was built early in 1903."

The witness testified about the same at Record page 464. The form of the question was objected to and the question was then put:

> "What is the date of this transaction to which you have referred, to the best of your recollection?
>
> A. In April, 1903."

showing that it was the recollection of the witness as to the letter which was admitted in evidence. We submit that nothing has modified that testimony in any material way. The particular invoice does seem to be to something else and constituted the misapprehension. It was too much for such a simple tank, hence the protest.

Judge Van Fleet has considered this matter as a matter of fact in his opinion in the present case. He considered it before in the main trial. We submit that his finding as to the facts should be quite persuasive and controlling on this Court.

Page 51, "2, Books and Records not Destroyed": Mr. Miller made a statement in this behalf which was another misapprehension which we apprehend had no influence on this Court as he cites the proof. The testimony of Mr. Dunkley referred to is in the following language, Record No. 2915, page 444:

> "Q. Where are the books of the Dunkley Company?
>
> A. I will have to go back to explain that. As I said before in 1908 the fruit industry of South Haven and vicinity was completely destroyed, absolutely destroyed; there was not anything left but a very few apple trees and some peach trees in what was one of the most prosperous fruit

belts of the United States; that of course was a blow that could not be appreciated unless you are in it. In 1907 the panic came, and *in 1908 the Dunkley Company went into bankruptcy, and for a year* its affairs were completely demoralized, so that the records of these transactions have been more or less destroyed, so that I would be unable to say regarding that.

Q. Have you no records whatever showing the purchase of any parts for this first experimental model machine or the first commercial machine?

A. The only record we have at the present time on this first machine covers the purchase of the first simple experimental tank that was built, that was used with this in 1903; otherwise we have practically no records left. What *few records* were left were at South Haven covering the transactions of the *factory work at South Haven,* and were burned when we had a complete fire loss in 1912."

It is now urged, most absurdly, that because the Dunkley Company received back a part of the records at the termination of the bankruptcy, for some reason the fire could not have burned the records at South Haven in 1912. The affairs of the bankruptcy were closed up long before 1912 and it is not said that all records were burned at South Haven but only as to the factory records or those factory records that would have a bearing on this tank and parts:

> "What few records were left were at South Haven covering the transactions of the factory work at South Haven."

not elsewhere—

> "and were burned when we had a complete fire loss in 1912."

We submit that there is no unexplained failure to produce books and records; nor is there anything extraordinary about Melville Dunkley's statement. The books of a bankrupt are not very precious.

Page 53. "3. The long table episode": This is so absurd as to its bearing that it is difficult to discuss it patiently. We have already pointed out that a photograph of the long table was offered in the original case and appears in the original record herein No. 2915 at page 911. It was offered in evidence in sur-rebuttal testimony by defendants, without any thought of any explanation by plaintiff because they recognized that the table was there.

Reference to the picture will show at the right a line of posts. At Record page 908 is a picture showing a plan of the factory floor on which this table was located. The entire north side of the building beyond the center line of posts is shown vacant and unoccupied, and it is in that space that the testimony shows the original first machine was installed. The space was very large. The machine was offered in evidence and a photograph of which appears at Record page 905. It is identified by many witnesses, and that structure was of such size that it was present here in the Court Room at the hearing, occupying about as much space as a desk or table. There was a tank with it—maybe as large as a small farm wagon box. These structures were disposed toward one end of this long space at the north side of the room, which space was more than 200 feet long and 16 feet wide.

We, therefore, protest regarding the statement of Judge Trippett quoted and referred to herein at page 52:

> "The construction of this table and the existence thereof in the peach season of 1903 is utterly inconsistent with the theory of the plaintiff's case."

This is a bare naked assertion, not warranted by anything that appears in the record, and shows how completely Judge Trippett was misled by the argument of counsel. There was a space for this little machine more than 200 feet long and 16 feet wide. It would not attract much notice in that large space.

Melville Dunkley is attacked because he said that a long table was put in 1904, and yet the piece de resistance of documentary proof, offered as *new* evidence by defendants, namely, the newspaper article of April 22, 1904, appearing at page 33 of the printed petition, recites:

> "as they are building an additional *paring* table 110 feet long."

which would seem to be sufficient to warrant Mr. Melville Dunkley's recollection of such a table.

Page 59. "4. Dunkley-Norton letters": We have touched on these letters in sequence in our main brief pages 27 to 29, and it is not necessary to repeat that discussion here. The letter of October 23, 1903, from Norton to Dunkley speaks of the successful use of the peeling machine during the preceding season, and Mr. Dunkley discusses the matter in a series of letters back

and forth, which it will not be necessary to touch on here.

Page 70. "5. Dunkley pay rolls": We submit that the mere introduction of the single-line peeling machine which would take care of one or two hundred bushels of peaches in a day, and the addition thereto of a three-line machine toward the end of the season, would not have occasioned any reorganization of the time workers and the piece workers. That would probably have occurred, according to Dunkley's testimony, in the year 1904, which appears according to the analysis given by defendants at page 72.

The pay rolls do show matters of importance. The name of Eleanor Wright-Moore does not appear during the year 1903, as to which time she swore so willingly, and we are very sure she was not there. She has confused the date in some way. She was a most willing witness for the defendants.

Also, another willing witness was Verna Hallock-Kern. The pay rolls indicate that she was at South Haven until about the middle of September, 1903, and the balance of the time at Kalamazoo. Yet she is defendant's star witness as to what occurred in South Haven, as to which her testimony must have been wholly hearsay.

There are no recitations in the pay rolls as to the kind of work the people were doing. We consider the same to be of importance in the manner which we have indicated.

Page 75. "6. Newspaper article of April 22, 1904": This newspaper article is a piece of evidence that for what it is worth supports Dunkley's position. We never have heard it seriously urged that newspaper article is so accurate that it might be implicitly relied upon as evidence of any particular fact that ever occurred. In fact many times we have heard doubt expressed as to the accuracy of what appears in our daily papers.

But this newspaper article is supported by the recollection of L. L. Crosthwaite. The article might very well state that new peeling machinery was being installed because the capacity of the new machine would certainly be likely to be increased. A new machine would be made. It has been explained that the first lye tank accumulated debris in the bottom and was lacking in capacity, which would account for the large lye tank with a pocket in the bottom and of capacity to handle the output.

It was entirely proper and appropriate that the newspaper article should recite the new machinery going in, and it is not inconsistent with the testimony of the Dunkleys. They have stated that further machines were made in the year 1904 and thereafter. There is nothing about these new machines that negatives the new machine of the year before. There was a new development and undoubtedly Stewart Campbell expended very considerable ingenuity under Dunkley's supervision in perfecting what is known in this case as the "prevaricator"; that is, the lye machine.

The newspaper article of April 22, 1904, entirely supports the Dunkley contention. It would be inconceiv-

able if a bushel or so of peaches were all that were passed through the machine in the Fall of 1903, that the Dunkley Company should tear out the inside of its factory and install an entirely new equipment. Mr. S. J. Dunkley referred to this in his letter to Norton, saying:

> "This we are sure will work as we worked the same thing last year and there is no question about it."

and as to the pitting machines, that it would "only cost 3 cents per dozen to halve and pit the peaches by other methods", so that whether those machines were a success or not was of no great consequence. We refer to these matters already quoted in our main brief.

Page 76. "7. Arthur W. Norton testimony": Norton in *ex parte* affidavit says that there was a machine in 1903 but he characterizes it as experimental. He tells very little. He has not been cross examined. We think he did not remember much about it anyhow, but what he did remember supports Dunkley's case. It appears that he only remembered when his memory was refreshed by Mr. Francis J. Heney. Strange that after repeated interviews he should only be able to remember something at last by the stimulating effect of an interview with Mr. Francis J. Heney. Mr. Heney is very persuasive, and we doubt if Mr. Norton's recollection was so clear as he imagined it was. No reason is assigned for Mr. Norton's recollection being better after the greater lapse of time.

Page 78. "(c) New matter set up in Paragraph IV of petition. Diligence in its presentation": This needs

no further discussion than we have already given it in our main brief. We have considered the materiality of what was produced, and it makes for the case of plaintiff.

There is no diligence on behalf of defendants. They have had this information for three years and more before they finally bring it to the attention of this court. So far as this proceeding is concerned they are entirely dilatory and negligent. So far as bringing the matter into the case is concerned it has already been brought into the case it having been found wanting in merit by Judge Van Fleet, and that matter is in shape to be brought to this court on appeal, if there is any merit in it, when an appeal shall in the future be taken after the final decree has been entered herein.

Page 80. "III. New matter grouped under Paragraph VII of the Petition": We have considered any new matter and there is nothing of new matter here presented that should modify the original finding of this court. The documents all support Dunkley and the oral testimony as to matters long past, unsupported by documents, should not avail the defendant in any event. There is no materiality to the matter now offered by defendants.

The defendants naively say at page 80, "Efforts though ineffective to secure relief show diligence and tend to negative *laches,*" and at page 81, great claim to diligence is made, showing that they have no faith in their proposition. So far as anything appearing in this record is concerned, the three years delay is fatal under the circumstances.

But if there is any merit to the defendants' contention, they have it already submitted in the case, and the matter can be brought here, if there is eventually an appeal from a final decree—not on an appeal from an interlocutory decree, because such matter is not appealable. An application properly presented to rehear can be considered by this court. Such matters have been presented, and if they are proper to be considered this court can review them, and the remedy here sought of filing an original bill in the nature of a bill of review does not obtain because it is but asking for a rehearing, which has been repeatedly considered by this court.

Page 82. "V. Decision of Judge Van Fleet on petitioners' applications that he request this court for permission to reopen": Judge Van Fleet refused to allow an appeal from his decision on that matter, because it was not applicable, and he has not misapprehended. Application had been made to this court to give leave to reopen this case. Litigation should end.

It is not necessary to discuss the rule of law applied by Judge Van Fleet. It was obviously correct. Dunkley has an existing patent; whereas, there is no proof worthy of special consideration as to Grier and no proof that he had anything prior to Dunkley.

As to the second item toward the bottom of page 83, we have already discussed Judge Trippett and Judge Hand, and they certainly based their conclusions on the testimony of Stewart Campbell, because they say they did, which, however, is quite astounding after this court had applied the rule of "*Falsus in uno, falsus in omnibus*" to Campbell's testimony in rejecting the same.

Page 84, "Dunkley has contributed nothing to the art. Patent void for other reasons": Responding to this we can say that the decision of the Court of Appeals for the District of Columbia is one of high rank and it is the foundation on which the Dunkley patent was issued as the result of an *inter partes* contest, an interference with Beekhuis, where this whole subject was carefully considered and argued.

That decision has been upheld ever since and the proofs have not changed since that date. As pointed out, Dunkley has no disposition or desire to change his proofs. His proofs then were that he had a complete machine installed in July, 1903. His preliminary statement shows conception of the invention the summer and fall before and the making of sketches and the like, and his testimony shows that peaches were peeled and the machine sufficiently tested then to know reasonably what the result would be, but the first machine was reduced to practice and tested out about July 15, 1903. The date of conception reaches back to the year previous.

CONCLUSION

We can only respond in conclusion that the defendants have heretofore made many moves for a rehearing. Under the latest decision of the Supreme Court on this subject, *Simmons v. Grier Brothers, supra,* they have no right now to file an original bill in the nature of a bill of review. Their remedy is by rehearing because of alleged newly discovered evidence, which must be material and diligence must appear. The court below has ruled on that as insufficient. It has further ruled that the petition was not presented in a timely manner but has chosen to consider the merits, indicating that in view of the high importance of the matter he would reopen the case if he found there was testimony to warrant it.

That matter is not reviewable on appeal from an interlocutory decree. If reviewable at all it can be reviewed by this court, as a court reviewing an equity matter after an appeal has been taken from a final decree in the case. The defendants can then be given every consideration the circumstances will warrant.

Defendants should not be allowed longer to delay this proceeding. Their motion should be denied.

Respectfully submitted,

Fred L. Chappell,
W. A. Richardson,
Counsel for Plaintiffs-Appellees.

No. 3824

In The

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CENTRAL CALIFORNIA CANNERIES CO., GRIFFIN & SKELLEY COMPANY, J. C. AINSLEY PACKING COMPANY, ANDERSON-BARNGROVER MANFG. CO., J. F. PYLE & SON, INC., HUNT BROTHERS COMPANY, SUNLIT FRUIT COMPANY,

Appellants,

v.

DUNKLEY COMPANY (now known as Michigan Canning & Machinery Company) and DUNKLEY COMPANY,

Appellees.

REPLY BRIEF FOR PLAINTIFFS-APPELLEES ON APPEAL AND MOTION TO DISMISS APPEAL.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3824.

CENTRAL CALIFORNIA CANNERIES CO.,
Appellant,
GRIFFIN & SKELLEY COMPANY,
Appellant,
J. C. AINSLEY PACKING COMPANY,
Appellant,
ANDERSON-BARNGROVER MANFG. CO.,
Appellant,
GOLDEN GATE PACKING COMPANY,
Appellant,
J. F. PYLE & SON, INC.,
Appellant,
HUNT BROTHERS COMPANY,
Appellant,
SUNLIT FRUIT COMPANY,
Appellant,

v.

DUNKLEY COMPANY (now known as Michigan Canning & Machinery Company) and DUNKLEY COMPANY,
Appellees.

REPLY BRIEF FOR PLAINTIFFS-APPELLEES ON APPEAL AND MOTION TO DISMISS APPEAL.

The statement of facts at page 5 of defendants-appellants' brief is incomplete because it omits any mention of defendants' petition to this court to vacate the de-

crees herein. The result of such motion was that this court refused to modify its mandate, and further made an order that the mandate when sent down should be without prejudice to the right of plaintiff to add the new Dunkley Company as party plaintiff.

At the time of making that motion the attention of this court was brought to the suit pending at Pasadena and to proofs therein. It is pointed out in the appellants' brief herein, at page 9, that this is the fact.

As this is the only matter from which appeal is allowed, and as we point out in our main brief this is not properly appealable matter, the appeal being an appeal from an *interlocutory* decree that does not have to do with the question of injunction, which had already been passed upon by this court as reported in 247 Fed. 790, it is very clear that this appeal should be dismissed.

The question of misjoinder of parties plaintiff, mentioned at page 14 of appellants' brief, is not an appealable matter; nor is the matter specified on page 16 an appealable matter, discussed under the heading "The order of the District Court was erroneous. It should have granted leave to the new Dunkley Company to file a supplemental pleading tendering proper issues calling for an answer by defendants. The effect of such a supplemental pleading would have been to *vacate* and set aside the interlocutory decree, the injunction and all proceedings since July 25, 1916."

It is clear that there was no such order made, the order being distinctly in accord with the new Equity rule 37, which among other things recites that

> "Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause."

The last clause of the rule recites:

> "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention,"

showing that the addition of a new party has nothing to do with the progress or of matters determined in the case. It is only necessary to show that the party is interested.

That the new Dunkley Company is interested appears here by showing of the defendants themselves. The matter, however, is not appealable, as only an appeal from a final decree is in order on such matters as are here in question. The case of *Kryptok v. Haussmann, 216 Fed. 267,* has nothing to do with the question of adding a party. It is a decision by Dickinson, district judge, for the eastern district of Pennsylvania. In that case the defendant's motion to dismiss was disallowed and permission was given to file a supplemental bill. Such a decision cannot possibly be material on the question of merely adding a party plaintiff.

In view of the fact that this matter is not appealable, we find that there is no occasion to consume the time of this court with a discussion of it.

This court has granted leave to the plaintiff to apply to the court for the inclusion of the added party. The court below has granted the petition, it being shown that there was really no change of party but a mere reor-

ganization. The objection urged by defendants is highly technical. It is, however, in no way timely, as no appeal should be allowed from such an interlocutory decree.

Hence the plaintiffs-appellees' motion to dismiss the appeal should be granted, for the reasons already stated in our main brief.

Respectfully submitted,

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No. 8824.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Central California Canneries Company, a Corporation, et al.,
Petitioners,

vs.

Dunkley Company, a Corporation,
Respondents.

OPINIONS AND DECISIONS OF THE COURTS

in suits and proceedings involving validity of DUNKLEY PATENT, number 1,104,175

(Reprinted for the convenience of the court.)

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF CALIFORNIA, SECOND DIVISION.

Oral Opinion of Judge Van Fleet, December 4, 1916.

The COURT. (Orally).—I have been endeavoring to secure an opportunity to write a brief opinion in this case, which is one for the infringement of a patent, but I have been too much taken up with other work, and I have determined that it is better that the cause be decided than that it be delayed further.

There was but one question, really, left at the conclusion of the hearing, and that was the question of priority of conception or invention and use of the device in suit, the validity of the claims, sued on being conceded, and that the defendants' device was within those claims. By reason of the very elaborate brief filed by the defendants, and the contentions made therein as to the testimony, I have taken occasion to review the evidence in its entirety, and I have been unable from my examination to withdraw my mind from the conclusion reached at the trial, that the plaintiff has sustained in its substantive features, the *onus* cast upon him of showing not only prior invention but prior use.

There are three several anticipating devices involved, two being the subject of patents and one not. The Beekhuis patent was in interference in the Patent Office on the very question of priority, and prior-

ity was awarded to the plaintiff, and this award was sustained by the Court of Appeals of the District of Columbia. It is claimed that the evidence here is in some respects substantially different from that which was presented to that Court, but I am unable to find that there is any such essential difference as to warrant this Court in holding other than in accord with the conclusion reached by the District of Columbia court. While that patent was applied for first, it was issued subsequent to the plaintiff's patent, and therefore is not technically an anticipation, and I am satisfied that the evidence sufficiently shows that it was not such in fact.

As to the Vernon device, it had been in use in Fresno as early as 1902 or 1903. I am unable to hold that that device was an anticipation in its essential characteristics. It operated upon a fundamentally different principle. That was an adaptation to the purposes for which the plaintiff's device was used, that of peeling peaches, of a device by Baker and another for scouring oranges for the market; it had a system of revolving brushes, and it used a saturation or douche of water for the purpose of softening the brushes and of washing the fruit; but the essential operative principle there was the brushes. They were for the purpose of scrubbing and washing the hard outer surface of the skin of the orange and of freeing it from mould and other detrimental substances which interfered with its marketability, and the essential principle was the operation of the brushes. The water was used, as

I have suggested, only for a saturating and washing purpose. I may say, furthermore, that the patent itself did not call for the essential feature which I find characterizes the plaintiff's device, that is, of peeling jets of water, or water admitted at such a high pressure upon the fruit as to act itself as the primary means of washing the skin from the fruit; nor do I think that the manner in which the Vernon patent was used was such as to suggest readily to the mind the idea that peeling jets of water would be efficient for the purpose for which the plaintiff's device was intended. The plaintiff's device operates upon quite a different principle. It has the rotating brushes, but has these peeling jets of water, which are themselves the efficient means of washing off the disintegrated skin of the peach after it has been put through the lye process, and the brushes serve the subsidiary purpose of agitating the fruit and of turning it for the purpose of presenting its different surfaces to the jets of water to enable them to do the efficient work of cleansing the skin after its disintegration by the lye bath; and I am therefore unable to hold that the Vernon device, which was subsequently patented—I think in 1905——can be regarded as an anticipation of the device or the conception embodied in the plaintiff's patent.

The only other device, one that never has been patented, I believe, is that of Grier. It is a very close question as to which of the two minds, that of Grier or that of Dunkley, the first conception of that

idea came. They were very nearly contemporaneous, and it is admitted that the Grier device does come within the claim of the plaintiff's patent. But the evidence fails to show such prior use of the Grier device as to operate to defeat the plaintiff's priority of right. Grier never has applied for a patent, I believe, and the evidence tends to show that upon its coming to his knowledge that it infringed the device of plaintiff, he abandoned that particular device and adopted another.

The main reliance by defendant in the evidence, is upon the testimony of the witness Campbell and that of the witness Brunker. I indicated at the trial, and my mind has been only confirmed in that view by my review of the evidence, that I could not extend the limits of my credulity sufficiently to put credence in the testimony of Campbell. That he worked for the plaintiff at or about the time that he claims, there is no question, but that the claim he puts forth as to what he did in the premises, and the time it was done, is entirely beyond my ability to believe. Brunker tends to corroborate him in certain respects, but it is not sufficient to change my conclusion on the facts.

In its essential substance I regard the evidence on behalf of the plaintiff as making a case substantially free from doubt, that the plaintiff's assignor conceived this device and put it to use at a time at least a year prior to the time claimed by Campbell; and as this is a question on which the case turns, the result is that the decree must go for the plaintiff.

(Reprinted from 247 Fed. 790.)

CENTRAL CALIFORNIA CANNING CO. et al v. DUNKLEY CO.

(Circuit Court of Appeals, Ninth Circuit, October 1, 1917.)

No. 2915.

Appeals from the District Court of the United States for the Second Division of the Southern Division of the Northern District of California; Wm. C. Van Fleet, judge.

Consolidated suits in equity by the Dunkley Company against the Central California Canneries Company, the Griffin & Skelley Company, the J. C. Ainsley Packing Company, the Anderson-Barngrover Manufacturing Company, J. F. Pyle & Son, Incorporated, the Hunt Bros. Company, and the Sunlit Fruit Company, a corporation. Decrees for complainant, and defendants appeal. Affirmed.

Certiorari denied, 38 Sup. Ct. 134, 245 U. S.—, 62 L. Ed.—.

Suits for injunction restraining the infringement of plaintiff's patent for a device for peeling peaches and other fruit, and for a decree that plaintiff recover from defendants the profits realized by them and the damages sustained by plaintiff by reason of said infringement. Decree for plaintiff. Defendants appeal.

On August 6, 1915, appellee filed its bill of complaint against the appellant Central California Canneries Company, alleging that plaintiff is the owner of letters patent No. 1,104,175 for an invention and device for

peeling peaches and other fruit, and that defendant has made and used, and is now engaged in using, infringing machines, to the great and irreparable injury of the plaintiff, and praying an injunction restraining such infringement of plaintiff's patent, and a decree that plaintiff recover from defendant the profits realized by defendant, and the damages sustained by plaintiff by reason of said infringement together with costs.

Defendant answered, raising the issue of priority of conception or invention and use of the device in suit, the validity of the claims sued on being conceded, as was the fact that defendant's device was within those claims. The answer contains the further allegation that plaintiff is guilty of iniquitous conduct in suppressing evidence of prior usage by means of a contract with the California Fruit Canners' Association, whereby, in consideration of a license under plaintiff's letters patent for the remainder of the term thereof, the California Fruit Canners' Association agreed not to assist any one in defending any suit brought for the alleged infringement of said letters patent, nor to give or furnish to any such party any information or data relative to any prior usage thereof.

When the case came on for trial it was by stipulation of the parties, consolidated with the seven other cases embraced in this appeal, which are instituted by the same plaintiff against various other fruit-canning companies, (791) and involve substantially the same issues. Evidence was introduced on behalf of all parties,

and thereafter the court entered an interlocutory decree in each suit, upholding the validity of plaintiff's patent, finding that the same had been infringed by the defendants' machines, and awarding plaintiff an injunction. Each decree further awarded to plaintiff the profits realized by the defendant and the damages sustained by plaintiff by reason of the infringement, and, for the purpose of ascertaining and stating the amount of such profits and damages, the matter was referred to a master. From these decrees in favor of plaintiff, the defendants bring the present appeals in the eight consolidated cases.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above).

The question of infringement is not important in the consideration of this case. The main issue is the validity of the plaintiff's patent; that validity depending upon the priority of conception and use of the device, both questions of fact. The defendants set up three anticipating devices, the Beekhuis, the Vernon, and the Grier.

Beekhuis made application for a patent for an "apparatus for removing the skin from fruit" on May 25, 1904, and patent thereon was granted September 3, 1907. The plaintiff Dunkley applied for a patent for a "machine for peeling peaches and other fruit" on November 29, 1904. His application was amended at various times, and on July 13, 1909, the Commissioner

of Patents declared an inference between his application and the patent previously issued to Beekhuis on September 3, 1907. The award of priority of invention and use was finally given to the plaintiff Dunkley by the Patent Office, and that award sustained by the Court of Appeals of the District of Columbia, and patent granted to him on July 21, 1914. It is not sought by the defendants to establish the Beekhuis patent in this suit, but that patent is relied upon as showing a device in use and patent applied for before the plaintiff made his application.

The full proofs in the interference proceedings are not in evidence, but portions thereof appear in the file wrapper and contents of plaintiff's patent introduced by the defendants, disclosing the various rulings of the Patent Office tribunals and the many amendments made in the claims to conform thereto. It appears to have been under consideration by Patent Office officials for five years after an interference was declared, and careful investigation made into each claim before patent was granted. There seemed to be no doubt in the minds of these officials, at the conclusion of the investigation, that the plaintiff was the first to conceive the idea and reduce it to successful practice; but there was some question whether he was entitled to make certain claims for "means for directing peeling jets of water upon said fruit." Although the water was used in this form from the time of the first practical (792) construction of a peeling machine by both Beekhuis and Dunkley, neither of them used the words "peeling

jets of water" in their first specifications of claims. Beekhuis was the first to include them in an amendment to his application and Dunkley copied them later on for the express purpose of having an interference declared. In each machine the fruit passes through a receptacle, where it is subjected to a bath in a heated solution of lye, which disintegrates the skin.

In the Dunkley device the fruit is then delivered onto an endless belt conveyor and passes between rotary brushes for about six feet, the brushes rotating the peach as it is carried along, so that every portion of its surface is subjected to the jets of water which strike the fruit tangentially from perforated pipes arranged along the passage, and driven with such force as to remove the disintegrated skin still remaining upon the peaches, and to cleanse the particles from the brushes. The peaches are advanced in single file, and are thoroughly peeled, cleansed, and cooled, and ready for the cans at the point of exit from the machine. In the Beekhuis device the peaches pass from the lye bath onto a large box screen of wire mesh so arranged as to shake the fruit as it passes over it. Above this shaking screen is arranged a water pipe with transverse slits at intervals, which deliver a broad fan spray or jet of water onto the fruit passing over the screen. A similar spray or jet of water is arranged on the under side also. The fruit is delivered onto this screen in a mass, and dependence is had upon its agitation in the box while advancing, the friction with each other and with the wire screen, and the action of the

water jets or sprays during such agitation, for the removal of the disintegrated skin. It was decided that both parties were equally entitled to make the claims for "means for directing peeling water jets upon said fruit," and patent was thereupon issued to Dunkley, priority of conception of the idea and reduction to successful practice having been previously awarded him. We see no reason for reversing this decision, after a careful reading of the testimony.

The Vernon device appears to have been an adaptation of an invention of Baker, Chalker, and others, patented in 1898, for the purpose of cleaning oranges by a brushing mechanism. As early as 1902 Vernon adopted this brushing mechanism as a means for removing the skin from peaches and other fruit, first subjecting the fruit to a bath in a heated solution of caustic soda, then to another in a solution containing alum, and then immersing it in cold water. It was next subjected to a brushing process, but no mention is made of the use of water under such pressure as to form peeling jets, or in fact of any use of water for peeling purposes. Vernon applied for a patent on his device in November, 1902, which was granted in March, 1905; but at the plant in Fresno, where the machines were first used in 1902 and 1903, they appear to have been supplanted by Beekhuis machines in 1904, according to the testimony, not proving satisfactory. The essential feature of the Dunkley device, the application of peeling jets of water to the surface of the peach while in rotation, is not

shown in the Vernon device, and it cannot be regarded as anticipatory in either conception or use.

(793) The Grier device was never patented. Grier appears to have been connected with the fruit-canning business for many years, and was familiar with the process of dipping peaches in lye as early as 1891, and thereafter washing them with water. In 1902 he formed a partnership with a Mr. Taylor, and leased a canning plant in Pasadena, where they handled peaches, among other fruits, and from the testimony it would appear that he was considering how to handle a greater quantity, and attempting to devise more efficient means for peeling than the hand method: but the only real experimentation that he made in 1902 was by putting a few peaches in a wire basket and dipping them in the heated lye solution, and then using a hose by hand to wash off the peeling. He says he conceived the idea right then of building a machine to do that work, but there is no testimony to the effect that he did anything in the way of reducing the idea to a practical form, or proving his idea an operative one, until the following summer, 1903, when he built two machines, one for his own plant, and one for another company in Pasadena, not identical with the plaintiff's machine, but embodying the idea of rotation of the peaches as they progressed, and the application of peeling sprays or jets of water. The ideas of Grier and the plaintiff may have been contemporaneous; but there is no evidence of such prior use of the Grier device as to defeat the plaintiff's priority of right.

Grier did not apply for a patent for his device, and discontinued the use of his machine when he received notice of Dunkley's claimed infringement.

There is in the record the testimony of one Stewart L. Campbell, who was called as a witness by the defendants in surrebuttal, and who testified that he was employed by the Dunkley Company in constructing machinery from the first of 1902 to December, 1904. According to the testimony of this witness he designed and built, in August, 1903, a peach-peeling table, for which the plaintiff obtained the patent in suit, and this he did without any ideas from Dunkley as to its construction. In other words, his testimony is to the effect that he was the designer of the invention for which Dunkley received a patent. But defendants insist that the testimony of this witness was not introduced to prove that fact, and they refer to their answer as showing that it was not so pleaded as a defense. The purpose of this testimony, they say, was to descredit the claim of Dunkley that he was the inventor, and not to offer the defense that Campbell was the inventor. But the testimony of Campbell upon that question was material and relevant to the issue before the court, and was either true or not true. If true, Dunkley was not the inventor of the device claimed as his invention, and that would end the case. If Campbell's testimony was not true, he was testifying falsely concerning a material and relevant matter, and his testimony would for that reason be wholly rejected. "Falsus in uno, falsus in omnibus."

But the defendants say they offer it only to prove that Dunkley was not the inventor. They stand on the priorities set up in their answer as defenses, namely, the priority of the Vernon patent for a process for peeling fruit and the Grier device for an apparatus used in conducting (794) that process. They deny the priority of the Dunkley peach-peeling machine, and offer the testimony of Campbell to prove that fact. This they cannot do. They cannot offer this testimony as true to prove a material and relevant fact for one purpose, and discredit it for another purpose. If it is true for one purpose, it is true for any purpose. And as the defendants have refused to commend the testimony of this witness to the court as true for a purpose to which it was relevant and material, we must reject it for the purpose for which it was offered, namely, to fix the date of the Dunkley constructed machine in 1903, instead of 1902. But, accepting Campbell's testimony as true in those particulars wherein he is corroborated by other witnesses, we find he worked for Dunkley on a machine of some kind in 1903; but this does not identify the machine as the one Dunkley claims to have invented in 1902, nor does it tend to prove the machine as Campbell's invention.

The rule of law applicable to the evidence in this case was stated by the Supreme Court in Adamson v. Gilliland, 242 U. S. 350, 353, 37 Sup. Ct. 169, 170 (61 L. Ed. 356), where the court says:

"Considering that a patent has been granted to the plaintiff, the case is preeminently one for the applica-

tion of the practical rule that, so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' Davis v. Schwartz, 155 U. S. 631, 636 [15 Sup. Ct. 237, 39 L. Ed. 289]. The reasons for requiring the defendant to prove his case beyond a reasonable doubt are stated in the case of The Barbed Wire Patent, 143 U. S. 275, 284 [12 Sup. Ct. 443, 450, 36 L. Ed. 154]."

The judgment of the lower court is affirmed.

(Reprinted from 261 Fed. 203.)

DUNKLEY CO, et al v. PASADENA CANNING CO. et al.
(District Court, S. D. California, S. D.
August 19, 1918.)
No. C-8.

In Equity. Suit by the Dunkley Company and the Michigan Canning & Machinery Company against the Pasadena Canning Company and George E. Grier. Decree for defendants.

TRIPPET, District Judge. This suit is brought to enjoin the infringement by the defendants of two patents held by the plaintiffs. One of the patents, No. 1,104,175, was involved in a suit entitled Dunkley Co. v. Central California Canneries Co., et al., hereinafter referred to as the San Francisco case. That suit was tried in the United States District Court for the Northern District of California, and an appeal taken. The case was decided by the Circuit Court of Appeals and is reported in 247 Fed. 790, 159 C. C. A. 648. This patent is for a machine for peeling peaches and other fruit by a process spoken of as the "lye process." The other patent is a patent upon a process of peeling peaches or other fruit or vegetables, and known as the "lye process." The number of this patent is 1,237,623, and was issued August 21, 1917.

The first matter for the court to consider, in determining the question concerning the patent for the machine, is whether or not the defendants here are estopped by the judgment in the San Francisco case. The plaintiffs claim that defendants here are in privity

with the defendants in the San Francisco case, and for that reason are bound by that decision. The defendant Grier was the manufacturer of one of the machines, which was held to be an infringement of the machine patent. Grier employed an attorney when this suit was brought to defend this case. He sought to get permission from the defendants in the San Francisco case to join in the defense of that case, but, before arrangements were completed to join in such defense, there was a (204) disagreement, and Grier refused to have anything further to do with it in the sense of joining in the defense thereof. Grier instructed his attorney to attend the trial at San Francisco and keep informed concerning the same. He was not, however, employed to assist in the defense of said cause. The attorney, however, was during the trial made a party of record in said cause, as attorney of the defendants therein. The defendant Grier and his wife attended the trial at their own expense. Grier also took his device to San Francisco to exhibit at the trial at his own expense. He testified as a witness therein. Other attorneys employed in the San Francisco case were employed by defendant Grier in this case. Grier in all these matters represented his co-defendant, Pasadena Canning Company.

During the trial of the San Francisco case, negotiations were entered into between the parties here concerning an agreement as to the effect a decree in the San Francisco case should have, and the parties, pend-

ing the trial of the San Francisco case, entered into a stipulation as follows:

"It is hereby stipulated and agreed by and between the parties to the above-entitled suit:

"(1) That the final hearing or trial of this suit be continued over the January, 1916, term of said court, and shall not be set for trial prior to November, 1916.

"(2) That either of the parties hereto, upon the trial of this suit, may use as evidence herein, with the same force and effect as if given in open court in this suit, any or all of the testimony of any witness together with the accompanying exhibits, forming part of the transcript and records of the trial of suit in equity No. 201, in the United States District Court for the Northern District of California, wherein said Dunkley Company is plaintiff and Central California Canneries Company is defendant, as the same is finally submitted to the latter court for determination, or either party hereto may likewise use the testimony of any one or more of such witnesses and call in open court any other of said witnesses, or any other or additional witnesses; it being the intent hereof to perpetuate for use in this suit all the testimony and proofs adduced in said suit No. 201, and render the same as available for use herein on behalf of the respective parties as though the same had been given in open court in this suit. It is further stipulated and agreed that the certificate of the official reporter to a copy of the manuscript of testimony in said suit No. 201, or to the testimony of any witness therein, shall be deemed a full and sufficient certification as to the correctness thereof, and that no further certification thereof shall be required to render the same admissible in this court under this stipulation," etc.

This stipulation was entered into on April 3, 1916, and the San Francisco case was decided on December 4, 1916.

The evidence here shows that the plaintiffs knew, at the time of entering into this stipulation, all the circumstances that tended to show that the defendants here were engaged in defending the San Francisco case, and, notwithstanding that knowledge, the plaintiffs entered into that stipulation. Now, if the plaintiffs believed at the time that the defendants here were estopped, why did the plaintiffs enter into a stipulation concerning the use of the evidence, as set forth in that document? What was the use of preserving the evidence, as introduced in that case, to be presented here as evidence in this case, if the defendant here were to be estopped by the judgment in the San (205) Francisco case? It seems perfectly plain that the plaintiffs cannot be permitted to assume the situation that they now seek to assume, because it is inconsistent with the position they took in entering into this stipulation.

The defendant Grier never directed any attorney to represent him or the Pasadena Canning Company in the San Francisco case, as a litigant in that case. Grier was neither a party nor a privy in that litigation. He had no legal right to defend or control the proceedings, nor to appeal from the decree. He was a stranger, and was not concluded by that judgment as a party thereto. He was indirectly interested in the result, because the question there litigated was one which might affect

his own liability as a judicial precedent in this suit, and therefore he sought to assist and advise the defendants in that case, in order that there might not be a precedent established to his injury.

The record does not disclose a state of facts that would justify the court in holding that the defendants here are estopped by the San Francisco record. Having determined that the judgment in the so-called San Francisco case is not an estoppel, it is necessary for the court to determine what effect shall be given to that decision. The whole record, including all the evidence taken in San Francisco, is introduced in evidence here. In addition to that, the court sat for many, many days taking evidence not in the San Francisco case. The proof here is so entirely different from the proof in the San Francisco case—that is to say, the evidence here contains so much proof, in addition to the proof taken in the San Francisco case—that this court cannot consider the question here involved as having been decided. If the San Francisco case were based upon the same facts proved in this case, this court would be strongly inclined to follow the decision in that case, regardless of whether or not there is an estoppel. But this court must be bound by the proof produced here, and what is decided must be the opinion of this court, and must contain the convictions of the judge. If any doubt remains after considering all the evidence introduced here, the court should give great weight to the opinion rendered in the San Francisco case, for the purpose of resolving that doubt. Under

the circumstances the San Francisco case cannot lead this court to a conclusion.

The plaintiffs claim that Dunkley conceived the process of peeling peaches by lye in 1901; that he made his first model or experimental machine in the peach season of 1902, and the plaintiffs insist that the Dunkley patent should be carried back to these dates. The first question, therefore, for the court to consider is: How far back of the date of application for patent can the Dunkley invention be carried?

Mr. Dunkley, the patentee, and his son, both testify here that the first machine that was built, as an invention of Dunkley, was built in the early part of the peach season of 1902. Mr. Dunkley testifies that he conceived the process in 1901; that this first machine, made in 1902, and the improved machine, which they testify was made in 1902-03, were used in 1903, in the Dunkley Company's factory, at South Haven, Mich., and most of the peaches in that season peeled by the last-men(206)tioned machine. Their testimony is supported by the evidence of other witnesses, either by testifying to circumstances that would indicate that the first or model machine was made in 1902, or directly and positively to the fact. Among these witnesses are Simpson, Schau, Sergeant, Wiers, Mrs. Lilly, Mrs. Mace, and Verhage and wife. The evidence given by Crary and Mrs. Wing Eastabrook is so confusing and contradictory that no weight can be attached to it. There does not seem to be any documentary or circumstantial evidence of any kind tending to support this testimony.

There is much circumstantial and documentary evidence in the case tending to show that Dunkley did not make his first or model machine prior to the summer of 1903. Dunkley made his application for patent on November 29, 1904. Dunkley was an inventor long prior to that time—had taken out patents and knew of the necessity of covering inventions with patents.

There was an interference proceeding between Dunkley and one Beekhuis. In that proceeding the evidence, on behalf of Dunklev carried the date of the construction of his first machine back to July, 1903, only. Mr. Dunkley testified, in the interference proceeding, that he first conceived the thought of the structure in the month of August, 1902, and that he made a drawing in 1902. This drawing, however, is not produced. He testified further in that proceeding that the model machine was made in the month of July, 1903, and put together at the factory at South Haven, Mich., and used there. Other evidence, in the interference proceeding, was along the same line. One witness, a Mr. Newton, produced by Mr. Dunkley in the interference proceeding who testified that this machine was made in July, 1903, now testifies that he was mistaken, and that it was made later that year.

Counsel for the plaintiffs argue that the evidence in the interference proceeding should be construed with reference to the fact, as I understand it, that it was only necessary to prove, in this interference proceeding, that the invention of Dunkley was prior to that of Beekhuis; that it was not necessary for

Dunkley to carry his invention back to the date that he now claims he made it. This contention of counsel does not appeal very strongly to the court. It would seem that these statements of Dunkley, and the evidence produced on that hearing, are very strong admissions that his first or model machine was made in 1903, and not in 1902. In Dunkley Co. v. California Canneries Co., No. 203, in equity, Northern District of California, on December 3, 1903, Mr. Dunkley, patentee, testified that the first machine was put up in June or July of 1903, Mr. M. E. Dunkley, the son of the patentee, testified in both of these proceedings, practically the same as his father.

The books of Mapes, which show on their face their authenticity, indicate that material to construct the first or model machine for the Dunkley Company was supplied to the Dunkley Company in the latter part of September, 1903. The books of Riddeford Bros., of Chicago, are in evidence. These books show that they are old, very much used, and they certainly show on their face that they have not been doctored (207). They show that they have been systematically and accurately kept; that brushes were made for the Dunkley Company, like the brushes used in the first or model machine. The plaintiffs offer no explanation anent this evidence. The books of John F. Noud Lumber Company are in evidence. This company supplied lumber to the Dunkley Company in 1903. They show the delivery of lumber suitable to construct a long table, at which women sat to peel peaches in 1903. There

was such a table in the building, about 150 feet long. The books of John C. Miller, a plumber, of South Haven. Mich., are in evidence. These books show that Miller supplied 300 feet of double-headed galvanized trough to the Dunkley Company July 23, 1903. There was a trough under this long table, on each side thereof, such as would be built from such material. These troughs were used by the women to wash their knives in while they were peeling. The books of Noud and Miller are almost conclusive evidence that that long table was built just prior to the peach season in 1903.

There is no explanation from the plaintiffs as to what such material, sold the Dunkley Company, could be used for, if not used as claimed by the defendants, in the construction of the table. The construction of this table, and the existence thereof, in the peach season of 1903, is utterly inconsistent with the theory of the plaintiffs' case. The plaintiffs claim that a complete and perfect machine, namely, the second machine, was operated during the peach season of 1903, where this long table stood. Plaintiffs further claim that practically all the peaches of the season of 1903 were peeled by the second machine. Several photographs, which witnesses testify were taken in 1903, are in evidence. One of the photographs is this particular long table, with the women sitting at it peeling peaches by hand machines and knives. The photograph of the peaches on the table shows that the peaches were peeled by a knife or hand machine, which made little ridges around the peach. When a peach is peeled

by lye, it is perfectly smooth, and such ridges do not appear. This is inconsistent with the theory of plaintiffs' case. One of these photographs contains a picture of a singular circumstance, tending to show that the picture was taken in 1903. This circumstance is that the picture itself shows a bouquet, containing the date of a party held by the employes of the factory in 1903. There can be no doubt in any one's mind but what that picture was taken in 1903. It shows many of the same people that sat at the long table peeling peaches by hand during that year.

This evidence of these books and photographs must be explained by witnesses, and the explanation has been ample to show that these books and photographs represent what the defendants claim for them. For instance, take the books of Mapes. They recite that the material was furnished for a peach-peeling machine. Mapes and Stewart Campbell corroborate what these books show, and the books certainly corroborate them. The testimony of Mr. Riddeford, concerning his books, is straightforward and clear. He corroborates Stewart Campbell concerning the ordering of these brushes, and the books certainly corroborate both of them. If Stewart Campbell did not order these brushes, as claimed by him, how did it happen that the defendants could find (208) this testimony, and the plaintiffs do not know anything about the account? The books of the lumber company and Miller are satisfactorily explained. They corroborate Stewart Campbell concerning the building of the table in 1903. It is proven by a

great many witnesses that the photograph introduced in evidence of the long table, and the women peeling peaches thereat, was taken in 1903. Some of the reasons assigned by some of these witnesses, for their convictions that this photograph was taken in 1903, are very simple. Each has a different circumstance by which the witness' mind has been refreshed, and which corroborates the witness concerning the date. If these pictures that were taken in 1903 show what was going on in the factory of the Dunkley Company at that time, it certainly would be a most remarkable thing that no photograph was taken of this wonderful machine for peeling peaches, if it existed at that time.

The letters passing between Dunkley and his business associates, the Nortons, strongly corroborate the theory of the defense. If this correspondence had passed between Dunkley and Norton in 1902 and 1903, instead of between 1903 and 1904, it would, of course, have supported Dunkley; but, as the correspondence stands, it supports the defense. For instance, September 17, 1904, Dunkley wrote to Norton, "The peeler works fine;" and on September 22, 1904, he wrote, "The peeling machine is running fine; so are the rotaries." On February 10, 1904, Mr. Dunkley wrote to Mr. Norton:

"We have the lye machine now nearly completed, with the rotary cleaner attached. This machine Mr. Campbell calls the 'prevaricator.' This we are sure will work, as we worked the same thing last year, and there is no question about it."

There is certainly no intimation in this letter that the machine was used in 1902; but does not it clearly show that he was informing his business associates that they had experimented with the machine in 1903?

There is other documentary evidence, such as the books of the Clark Engine & Boiler Company, which throw more or less light upon the controversy. Then there is the testimony of Crosthwaite, which is almost documentary evidence, because it is based upon a newspaper article concerning the operation of the factory. It was written October 1, 1903. He went there for the purpose of writing up an article about the factory, and, if this wonderful peach-peeling machine had been in operation he certainly would have had an account of it in his article. Referring to his article appearing in the paper, he testifies that there was no such machine there.

It is proper that the court should notice especially the testimony of Stewart Campbell. Reference has already been made to much evidence to corroborate his statement concerning the making of the first or model Dunkley machine; but there is much other evidence to corroborate it. The evidence of the plaintiffs shows that Stewart Campbell was regarded as a sort of genius. He was there making new machines. He made the peach separator and a peach pitter. The letters of Mr. Dunkley to his associates show that Stewart Campbell (209) was regarded by him as the man who would most likely make the machine, and they show conclusively that Stewart Campbell made the three-line or second

machine. This is the machine exhibited by the drawings in the patent, and which the defendants claim was never used until 1904. There is no reason in any event for discrediting Campbell's story.

The first or model machine is a reproduction of the Baker orange washer, patented many years before. It is almost an exact reproduction of the drawing set forth in the Baker orange washer patent. The only difference between the first or model Dunkley machine and the Baker orange washer is that in the Dunkley machine there were three pipes, with a single row of perforations in each, while in the Baker orange washer there was one pipe, with three rows of perforations for sprays. In the Dunkley first or model machine brushes as conveyors were put on the belt, instead of some other kind of conveyors, as on the Baker orange washer. The difference between the two is simply a mechanical divergence. I cannot help but think that the idea for the first or model Dunkley machine was taken from this patent. There is no evidence that Campbell ever saw the drawing; there is, however, no evidence that he did not see it. Campbell's testimony would seem to indicate that he wanted it understood that he devised this first or model machine, and that it was an original creation of his own. This may be so, and yet his ideas may have come from a vision of the Baker Orange Washer patent drawing. He may have seen it, and forgotten that he had.

It is also proper that the court should refer to the evidence of William Brunker. It is argued that the

evidence of Brunker is most astounding, and that it should not be believed. Brunker, in his evidence, does not seem to take credit to himself for making any discovery. The process of peeling peaches by hot lye had been known for a generation before Dunkley made his experiments. It was inserted in a publication, known as the "Archdeacon's Kitchen Cabinet," which was in existence in 1876. It had been previously patented by Mrs. McDermott in 1895, and it was well known even in South Haven, where Brunker worked. The method he used was the common form of using that process in peeling peaches. Why, then, is his story to be regarded as startling and unworthy of credit, as claimed by the plaintiffs? His story is very simple; he said that he, at the instance of Mr. Dunkley, experimented with the process of peeling peaches by lye. The only thing he did that could be regarded as new was to rub the peeling off with a brush. He states that Dunkley said, "What you are doing with your hands, we must do with a machine." This is a very simple story. To my mind it corroborates the description given of the machine in the patent. It convinces me that Mr. Dunkley originally thought that the brushes had a great deal to do with the process and the success of the machine.

There are many witnesses, on behalf of defendants, who testify that the Dunkley machine was made in the autumn of 1903, and first used then. Other witnesses testify to circumstances which tend to corroborate these witnesses. Take the evidence of Mrs. De Pue, a

very (210) bright and intelligent lady—a woman of authority in the Dunkley factory. She testifies that she did not want to come to California; refused to come, until they proposed to take her deposition; that when she was approached by the defendants concerning the case she immediately communicated with Melville Dunkley. She went to the office of the Dunkley Company's attorney to tell him what she knew. Subsequently, when she was further approached by agents of the defendants, she communicated the fact to the Dunkleys, and offered to testify for the Dunkley Company, if they wanted her evidence as she stated it to them. This shows that she is a fair witness. Take her simple story that, in the autumn of 1903, she pitted a pan of peaches, peeled by the lye process. She told in a simple way this simple story. She did not remember the small things surrounding the circumstances, and that is to her credit as a witness. If she had been lying, she would have testified to have remembered many of the trifling details concerning which she was asked. Many other witnesses might be mentioned, who told simple stories that strongly sustain the theory of the defense, such as Augensen and Hetherington. The attorneys have so carefully digested and analyzed the evidence that it would not be much labor to state here what each of the great number of witnesses, testifying on behalf of the parties hereto, said; but it is deemed unnecessary.

It is sought by the plaintiffs to discredit the testimony of the witnesses for defendants, because their expenses and per diem were paid to them to come here

and testify. A trip to California might influence the testimony of some witnesses, but it is hardly to be believed that the testimony of so many witnesses could be influenced in such a way. If the expenses and per diem were not paid by the plaintiffs to their witnesses to come here and testify what shall we think of them? Would it not show that they were greatly interested in the plaintiffs winning the case? Then how shall we weigh the circumstances concerning the payment of witnesses' expenses and per diem ,or not paying them?

In view of what has been said, and much more that could be said, the court is convinced that first or model machine ever built for Dunkley to peel peaches by the lye process was built in the autumn of 1903, and no machine at all was built in 1902. The evidence heretofore stated tends strongly to prove that the Dunkley conception was not made until the summer of 1903, and that Mr. Dunkley is wrong in his claim to a conception at a prior date. It is therefore the opinion of this court that the Dunkley patent cannot be carried back beyond the summer of 1903. It seems proper to say that the evidence convinces the court of the above conclusion beyond a reasonable doubt.

Was the Dunkley machine anticipated? Having reached the conclusion that the Dunkley invention cannot be carried back of the summer of 1903, it follows necessarily that the Pyle machine being a combination of the Cunningham prune dipper, the Anderson-Barngrover & Co. prune grader, with the sprays thereon, the Grier grasshopper and shaker machine, with the sprays thereon, and the Roach (so-called) "squirrel

cage" pea-grader attachment, were each and all (211) anticipations of the Dunkley machine, in so far as in issue here. Each of these machines had a spray to wash the peeling from the peaches. The Pyle machine was successfully used in 1901. This is conclusively shown by the records and files of the Pyles, and these are amply corroborated by disinterested third party witnesses. Even if the Dunkley invention could be carried back to 1902, this Pyle machine would be prior. It is wholly unnecessary for the court to describe these machines, for it is plain they were infringing, if not prior.

Much stress is laid upon the claim that the Dunkley machine sprayed the water under hydraulic pressure of great force. If the amount of the pressure were the controlling feature in the case, it would seem that even in this the Dunkley machine was anticipated, for a pump was installed to assist the pressure in the Vernon machine at Fresno, and the Dunkleys did not install a pump to assist the pressure until 1905. But the amount of pressure placed upon the water cannot control here, because it is a matter that must be regulated during the operation of the machine. The amount of pressure is varied according to the character of the fruit and according to the condition of the lye solution. It is simply a question of exercising mechanical judgment in the operation of the machine.

The plaintiffs claim that the Dunkley machine should have a broad interpretation, covering the spraying of the water upwardly on the fruit. The defendants have never used a machine with peeling jets of water

spraying upwardly on the fruit, nor have they used a machine where jets of water strike the fruit tangentially. The question, therefore, concerning the validity of the plaintiffs' patent as to peeling jets or sprays of water playing upwardly or tangentially on the fruit, is not involved in this case.

Dunkley was late in adopting the device of pitting the peaches before subjecting them to the peeling process. The fact that he ran the peaches through the machine whole largely necessitated stronger hydraulic pressure producing the jets of water than was necessitated in the other machines.

The Pasadena washer does not infringe the Dunkley patent, even giving the patent the very broadest interpretation and validity. The Pasadena washer is but an improvement upon the McDermott machine. Mrs. McDermott, it would seem, mothered the progress made by this machine in the handling of peaches. The claim made by the plaintiffs that the Pasadena washer uses a jet or spray of water in the washing of peaches is far-fetched. What difference is there between Mrs. McDermott's machine, where the peaches are lifted out of one compartment of the machine into another, and the water sprayed through holes, and the Pasadena washer, where the peaches are lifted out of one compartment and brought into another with similar holes in the buckets or dippers? In some of the Pasadena washers it is true that the water can be made to spray into a compartment or compartments of the washer, but the defendants never intended that these sprays should be used for the purpose of peeling peaches,

but only for the purpose of filling the vats with water. Such sprays would be wholly inefficent for the purpose of peeling peaches.

(212) Is the Dunkley process patent valid? The most essential feature of this patent is the use of lye or caustic soda in a hot solution. Mrs. McDermott secured a process patent for peeling peaches with lye and alum many years before the Dunkley experimentation. She asked for a claim in her patent without the use of alum, but this was disallowed. Her application for a patent, with such a claim, however, was a disclosure to the world. Then why should Dunkley have a patent for the use of lye or caustic soda, when she could not get one? Her process contemplated the use of hot scalding lye, and then washing the lye off with water. There is an allowance in the Dunkley patent of hydraulic sprays of sufficient force to remove the loosened skin. This, however, is not an essential feature of the process. So far as the process is concerned, the cleaning of the fruit may be done in any manner. The element in the claims of Dunkley's process patent, concerning the passing of the fruit into the range of action of hydraulic sprays of sufficient force to remove the loosened skin, amounts to no more than the patenting of the result of the Dunkley machine. I am clearly of the opinion that there is no validity at all to the Dunkley patent. No. 1,237,623.

The defendants will draw a decree, dismissing the bill and supplement thereto, in accordance with this opinion, and submit it to the plaintiffs.

(Reprinted from 261 Fed. 386.)

DUNKLEY CO. et al v. PASADENA CANNING CO. et al. (Circuit Court of Appeals, Ninth Circuit. October 29, 1919. Rehearing Denied January 5, 1920.)

No. 3316.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suit by the Dunkley Company and the Michigan Canning & Machinery Company against the Pasadena Canning Company and George E. Grier. Decree for defendants, and complainants appeal. Affirmed.

This is a suit for infringement of letters patent No. 1,104,175, issued July 21, 1914, for a machine or device for peeling peaches and other fruits, and also for infringement of letters patent No. 1,237,623, issued August 21, 1917, for the process of peeling peaches or other fruits or vegetables. From a decree in favor of the defendants, the plaintiffs have appealed.

Many of the questions here involved were before this court on appeal in certain consolidated suits, wherein one of the present appellants was plaintiffs, and parties other than the present defendants were defendants. A decree upholding the validity of the machine patent and adjudging infringement was there affirmed by this court. Central California Canneries Co. v. Dunkley Co. 247 Fed. 790, 159 C. C. A. 648. Reference is made to the opinion in that case for a more complete description of the patented machine or device and the issues involved, as the pleadings in the

several cases are substantially, if not identically, the same.

Before Gilbert and Hunt, Circuit Judges, and Rudkin, District Judge.

Rudkin, District Judge (after stating the facts as above). While there are many assignments of error, the only questions deemed worthy of consideration are the following. The appellants contend: First, that the appellees are estopped by the judgment or decree in the case of Central California Canneries Co. v. Dunkley Co., supra; second, that, regardless of the question of estoppel, the decision in that case should be followed here under the rule of stare decisis; third, that, regardless of the prior decision, the patents in suit are valid; and, lastly, that the patents have been infringed. The court below (387) found against the appellants on each of these several propositions, but in the view we take of the case it is only necessary for us to consider the question of infringement; for, assuming that the decision in that case should be followed here and is binding upon the appellees, the question of infringement was not there involved, because the Grier machine or device then before the court is not involved in the present case. In that case we said:

"The Grier device was never patented. Grier appears to have been connected with the fruit-canning business for many years, and was familiar with the process of dipping peaches in lye as early as 1891, and thereafter washing them with water. In 1902 he formed a partnership with a Mr. Taylor, and leased a canning plant in Pasadena, where they handled

peaches, among other fruits, and from the testimony it would appear that he was considering how to handle a greater quantity, and attempting to devise more efficient means for peeling than the hand method; but the only real experimentation that he made in 1902 was by putting a few peaches in a wire basket and dipping them in the heated lye solution, and then using a hose by hand to wash off the peeling. He says he conceived the idea right then of building a machine to do that work; but there is no testimony to the effect that he did anything in the way of reducing the idea to a practical form, or proving his idea an operative one, until the following summer, 1903, when he built two machines, one for his own plant, and one for another company in Pasadena, not identical with the plaintiff's machine, but embodying the idea of rotation of the peaches as they progressed, and the application of peeling sprays or jets of water. The ideas of Grier and the plaintiff may have been contemporaneous; but there is no evidence of such prior use of the Grier device as to defeat the plaintiff's priority of right. Grier did not apply for a patent for his device, and discontinued the use of his machine when he received notice of Dunkley's claimed infringement."

On the contrary, the Grier machine or device now owned and operated by the appellees is a patented device, and in our opinion differs widely and materially from the device covered by the Dunkley patents. A brief reference to the claims in the respective patents will readily demonstrate this. Under the Dunkley patent the fruit is delivered into an endless conveyor, and passes between rotary brushes for a distance of about six feet; the brushes rotating the peach as it passes

along, so that every portion of the surface is subjected to jets of water striking the fruit tangentially from perforated pipes arranged along the passage, and driven with such force as to remove the disintegrated skin remaining on the peach and cleansing the particles from the brushes.

The appellees' device, on the other hand, is well described in the second claim of the patent as follows:

"In a fruit-treating machine, a cylinder, a series of partitions in said cylinder formed with central openings, said partitions dividing the cylinder into a series of communicating compartments adapted to contain a body of liquid, a revoluble shaft extending axially of the cylinder, a series of perforated projected screw blades of relatively great pitch, offset and angularly disposed to each other, mounted on said shaft, one blade in each compartment, adapted on rotation of the shaft to pick up the fruit deposited in one compartment and eject it into the adjacent compartment through the opening in the partition, and whereby the fruit may be advanced step by step throughout the length of the cylinder and finally discharging therefrom." (388)

In view of the prior state of the art, it is quite apparent to us that there is a substantial and material difference between the two devices. The art of peeling peaches by the use of hot caustic soda or lye, and then removing the disintegrated skin by the use of water, was well known years before the application for the Dunkley patent was made. The manner of using the

caustic soda or lye was always the same, but the mode of removing the disintegrated skin varied from time to time, from merely dipping the peaches in water in a perforated bucket, to the use of a common hose. In view, therefore, of this prior state of the art, the Dunkley patents must be limited to the particular means employed, and those means must be limited to directing peeling jets of water upon the fruit as described in the patent. For if the patent should be construed to cover every possible means for removing the disintegrated skin by the use of water it would grant an unwarranted monopoly, and, furthermore, the patent would be rendered utterly void because of anticipation and prior use. The court below saw the different machines in operation, and its conclusion upon the facts that there was no infringement is manifestly right.

Some question has been raised as to the costs or witness fees in the court below, but no particular item is objected to, and we see no reason for disturbing the conclusion of the court in that regard.

The decree is therefore affirmed.

"United States Circuit Court of Appeals for the Ninth Circuit.

"Dunkley Company and Michigan Canning & Machinery Co., plaintiffs-appellants, vs. Pasadena Canning Company and George E. Grier, defendants-appellees.

Equity No. 3316

Petition To Rehear

(Excerpts from Petition)

"In this case the main defendants' machine sued on in the original bill of complaint is identical in structure with the defendants' structure held to infringe in the Central California Canneries case, 247 Fed. 790. Defendant Grier built both machines, and this machine of the defendants here was used after notice and during the peach season of 1914, by both the defendants herein. (The Pasadena structure was later and was brought in by supplemental bill.)

"Thus an order of this Court affirming the decree of the Court below is, on the face of the pleadings and proofs, a substantial holding that the structure held to infringe in the first case is not an infringement here." * * *

"This is made the subject matter of Assignment of Error 63, which assignment is in the following language, R. p. 14, 63:

" '63. The Court erred in not holding that the machine of George E. Grier before the United States Court of Appeals for the Ninth Circuit, appearing in exhibit, Certified Copy of Record of Appeals, pages 27-35 inclusive, and also exemplified in Plaintiffs' Exhibit No. 9, is an infringement of Patent No. 1,104,175, and that the use thereof constitutes an infringement of the process patent No. 1,237,623.'

"(Exhibit No. 9 is appended hereto.)"

"This is defendants' first structure and is discussed at p. 240 of Plaintiffs-Appellants' main brief, under the heading 'Infringement is Clear. Assignments 62 and 63.' "

"United States Circuit Court of Appeals for the Ninth Circuit.

"Dunkley Company and Michigan Canning & Machinery Co., plaintiffs-appellants, vs. Pasadena Canning Company and George E. Grier, defendants-appellees.

Equity No. 3316

MOTION OF PLAINTIFFS-APPELLANTS TO REMAND AND REOPEN

In the presentation of this motion pages 1309, 3508, 3510, 3511, 3512, 3513, 3514, 3515, 3516, 3518, 3519, 3521, 3529, 3536, 3546, 3547, 3548, and 3822, 3823, 3824, 3825, 3829, and 3830 of the record in the above entitled cause, as well as pages 315, 320 and 342 of the record in the case at bar were referred to and quoted as clearly showing the first Grier device involved in the case.

Statement of Judge Gilbert at the conclusion of the argument.

"JUDGE GILBERT: It occurs to the court that the only question here is whether or not a sentence in the opinion of this court should be corrected or modified, and that matter will be sent to the judge who wrote the opinion of this court on the merits of the case. *We were very firmly of the opinion that the decision of the court below should be affirmed.* The present motion will be denied. It is possible that the sentence in the opinion referred to may be corrected."

"Supreme Court of the United States, October term, 1919.

"Dunkley Company and Michigan Canning & Machinery Company, petitioners, vs. Pasadena Canning Company and George E. Grier, respondents.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

(Excerpts from petition)

"To state the entire matter more in detail, with specific reference to the record:

"I. The court herein has in effect overruled its former decision. In the instant cause the United States Circuit Court of Appeals for the Ninth Judicial Circuit comprising Circuit Judge Gilbert presiding, Circuit Judge Hunt and District Judge Rudkin who wrote the opinion, affirming the decree of the District Court for the southern District of California, Southern Division, Judge Trippet presiding, has, in holding the Dunkley patent not infringed, in effect overruled the former decision of the same court, differently constituted as to membership, in the case of Central California Canneries Co. vs. Dunkley Co. (247 Fed. Rep. 790.)" * * *

"II. The Court of Appeals herein has refused to consider the first Grier structure as before it, notwithstanding the entire record in the former case was here stipulated, and the fact that that structure was put in evidence without objection, and conceded to be before the court by counsel for both parties, the appellate court raising the question of its own motion." * * *

"This ruling is contrary to the evidence and to the concessions and statement of counsel for both sides, and is wholly unwarranted by the record."

The full copy of the petition is on file in the above entitled case in this court.

To these points the respondents replied:

"Was the legal effect of the proceedings in the Circuit Court of Appeals subsequent to the handing down of the written opinion, a refusal of that court to pass upon the issues necessarily before it with the first Grier machine in the case, or, as expressed by counsel for petitioners, an adherence to the statement contained in the original opinion that the machine was not involved? If so, we unhesitatingly join with the petitioners in requesting this court to take cognizance of the case. It would, indeed, be a grave judicial wrong for parties to be turned out of court without a determination of issues actually presented and necessary to be decided to a complete disposal of the controversy, especially when both parties had gone to heavy expense in litigating these very issues.

"But we respectfully insist that the Circuit Court of Appeals has disposed of these very issues adversely to the plaintiffs. The issues and the necessity of a decision thereon were forcefully presented to the court in the petition for a rehearing. In view of the petition, the court could not very well have been in any doubt as to the first Grier machine being in the case. When the court denied a rehearing, the effect of its order was to resolve the issues thus specifically called to its attention and before it against the plaintiffs. The court adhered to its judgment of affirmance of the decree appealed from. The issues were all purely issues of fact. The only question was whether the findings of the trial judge were 'supported by the credible testimony of reputable witnesses.' (Butte & Superior Copper Co. v.

Clark & Montana Realty Co., 249 U. S. 12, decided March 3, 1919.) No discussion of these issues was necessary. The effect of an adjudication is not dependent upon a written opinion. (Napa Valley Electric Co. v. Railroad Commission, decided by United States Supreme Court, January 19, 1920, and reported in U. S. Supreme Court advance sheets, Feb. 15, 1920, p. 202.) A denial o fa petition for rehearing may be a binding determination of issues presented by the petition. (Mayo v. Washington, 122 N. C. 5, L. R. A. 163, 166.)

"That the court considered its denial of a rehearing, under the circumstances a disposition of these issues, is quite plain from the statement delivered on February 2 at the conclusion of the argument upon plaintiffs' supplemental motion, when it was said, among other things:

" 'We were very firmly of the opinion that the decision of the court below should be affirmed.'

"While it might have been gratifying to counsel to have had Judge Rudkin rewrite his opinion, we can very readily appreciate how he considered such a course unnecessary. The issues had been fully determined by the denial of a rehearing. The effect of the denial had been construed by the court. Indeed, to argue otherwise would be to cast an unwarranted reproach upon our judicial processes.

"And it is significant that petitioners themselves, at points in the petition, recognize that the effect of the action of the Circuit Court of Appeals was to determine these very issues adversely to them (p. 2 of Petition.)"

"The Supreme Court denied the petition, April 26, 1920."

(Reprinted from 277 Fed. 989.)

DUNKLEY CO. v. CALIFORNIA PACKING CORPORATION.
(District Court, S. D. New York, April 23, 1920.)
No. 572.

In Equity. Suit by the Dunkley Company against the California Packing Corporation. Decree for defendant.

AUGUSTUS N. HAND, District Judge. This is a suit for infringement of letters patent No. 1,104,175, issued July 21, 1914, to Samuel J. Dunkley, and letters patent No. 1,237,623, issued August (990) 21, 1917, to the same person. The first patent relates to machines for peeling peaches or other fruit or vegetables, and the second to an improved process for peeling peaches or other fruit or vegetables. The claims in the first patent relied on are 5, 6, 14, 19, 20, 21, 22, 23, 24, 25, and 26, and in the second, 4, 5 and 7.

The first patent was held valid and infringed in a suit by the above-named complainant, the assignee of the patent, against the Central California Canneries Company, and the decree of Judge Van Fleet in that case was affirmed in the Circuit Court of Appeals for the Ninth Circuit (247 Fed. 790).

Both patents were held invalid for anticipation and lack of invention in the case of Dunkley Co. and Michigan Canning and Machinery Co. v. Pasadena Canning Company and George E. Grier (261 Fed. 203), by Judge Trippet, and his decision has been recently affirmed by the Circuit Court of Appeals of the Ninth Circuit (261 Fed. 386). Judge Rudkin, who wrote the

opinion, did not place the decision upon anticipation or lack of invention, but upon noninfringement. He said as to the first decision of the Circuit Court of Appeals:

"For assuming that the decision in that case should be followed here and is binding upon the appellees, the question of infringement was not there involved, because the Grier machine or device then before the court is not involved in the present case."

The foregoing language of the decision of the Circuit Court of Appeals would seem to me to indicate that the court, while it did not attempt to disturb the decision between the parties in the prior case declined to consider the question of anticipation there involved and to say whether it would follow its former decision or not, contenting itself with disposing of the question of infringement only.

After hearing the testimony, I was very clear that the complainant had not a valid patent, and that the decision of Judge Trippet was correct. As the Circuit Court of Appeals for the Ninth Circuit upon a different record from the one presented to me had held the original patent valid, and shortly after the briefs were submitted I learned that the appeal in the second case was soon to be heard, I thought it better to make no disposition of the matter until the Circuit Court of Appeals had passed upon a record not very dissimilar to the one before me, and had a chance to determine whether or not Judge Trippet was right in the decision of the case that seemed at first sight

to differ from the first decision of the Circuit Court of Appeals. I confess I regret to have had no more definite disposition of the various findings of Judge Trippet, but as I have examined the voluminous briefs and the printed record of the testimony before me and some excerpts from the testimony in the other cases, I am more convinced than ever that complainant should not prevail.

At the very outset complainant is met by the very formidable defense that the defendant is a licensee under the Dunkley patents. The Dunkley Corporation granted a license to the California Fruit Canners' Association—

"For the benefit of itself and its successors * * * for the use of the said invention in connection with its business relative to the canning or treatment (991) of fruit * * * the said license herein granted to be for the benefit of the said California Fruit Canners' Association and its successors for the full term of years of any letters patent which may hereafter be granted for the invention set forth in the said application Ser. No. 234,715 now pending in the United States Patent Office."

It may be here noted that the foregoing application seems to have been divided in the Patent Office, and thereafter to have resulted in the two patents in suit.

After the above license was granted to the California Fruit Canners' Association, that corporation sold, transferred, and assigned to the defendant its "busi-

ness, franchise and property as a whole," and since such sale has never done any business. The defendant thereafter reduced its capital stock, and about two months after the transfer acquired all but ten shares of the stock of the California Fruit Canners' Association. The transfer was accompanied by an agreement of the defendant to assume all the debts and obligations of the transferor.

The defendant insists that under these circumstances, although no merger or consolidation was technically affected, nothing was left of the California Fruit Canners' Association but a mere corporate shell, and that the transaction was in effect a merger carried out in the only way then possible under the California statutes.

In the case of Lightner v. Boston & Albany Railroad, 1 Low, 338, Fed. Cas. No. 8,343, there was a Massachusetts statute providing for the consolidation of the Boston & Worcester and Western Railroad corporations. The Boston & Albany Railroad was formed pursuant to this legislation, and the statute declared that the new corporation should have, hold and enjoy all the powers, rights, privileges, franchises, property, claims, demands, and estates which at the time of such union were held and enjoyed by either of the then existing corporations. The old corporations were still kept in existence for certain purposes, but the court held that a license belonging to the original companies to use a patented invention passed to the Boston & Albany Railroad. In that case the word "successors"

does not seem to have appeared in the licenses. This case was referred to by the Supreme Court with approval in Lane & Bodley v. Locke, 150 U. S. 193, 14 Sup. Ct. 78, 37 L. Ed. 1049. That court, in citing the Lightner Case, said that it was there held:

"That a license, though not usually transferable, is transmissible by succession to a corporation formed by the union of two licensees succeeding to the obligations of both, for the reason that the consolidated company is the successor rather than the assignee of the original companies."

In the Lane & Bodley Case it appeared that a copartnership which had obtained an implied license was incorporated. While it is true that there the patentee worked for the corporation as well as the partnership and there were thus other facts than the mere practical perpetuation of the copartnership in corporate form, nevertheless the transmission of the license by reason of the practical identity of the business of the partnership and the corporation was, in the opinion of the court, an apparent incident of the transaction.

In the case of Hapgood v. Hewitt, 119 U. S. 226,7 Sup. Ct. 193, 30 (992) L. Ed. 369, the court held that a license to a corporation, afterwards dissolved, would not pass to a corporation which had been formed by the stockholders of the defunct company, where there were no words indicating the right of the licensee to assign.

In Niagara Fire Extinguisher Co. v. Hibbard, 179 Fed. 844, 103 C. C. A. 330, the Circuit Court of Ap-

peals for the Seventh Circuit held that a corporation which took from another, afterwards dissolved, all of its property, profits, and good will by a bill of sale, but without assuming any of the liabilities of the grantor, was not the legal successor of such grantor and did not succeed to its right under a contract granting it a license which by the terms of the contract was not assignable without the consent of the patentee.

In the present case the license was—

"For the use of the said invention in connection with * * * (the) business relative to the canning or treatment of fruit * * * the said license herein granted to be for the benefit of the said California Fruit Canners' Association and its successors."

The word "successors" originally was used in connection with a corporation sole, where the person, but not the corporate entity, would change. It was also used in connection with an aggregation of persons named in the charter, who would necessarily change, and to whom corporate franchises were granted. These words in the license granted to the California Fruit Canners' Association add nothing and have no significance if they are to be taken in the antique sense for which the complainant argues. I think the use of the word "successors," in connection with the other words, "for the use of the said invention in connection with its business relative to the canning or treatment of fruit," clearly indicates a purpose to allow the transmission of the license to a corporation fairly succeeding to the business of the California Fruit Canners'

Association. Anv other interpretation would seem technical and unjust under the circumstances.

The cases of Lightner v. Boston & Albany Railroad, and Lane & Bodley v. Locke, supra, are in line with the results that I have reached and show that the federal courts have treated situations like the present in a broad way and have allowed corporations succeeding to the business of a licensee to succeed to the license where the particular circumstances of the case warranted such a result.

The case of Niagara Fire Extinguisher v. Hibbard, supra, seems in a general way to support the view I have taken. It is true that the decision was that the license would not pass, but that was because there was a contract against an assignment without the consent of the licensor in the bill of sale from the licensor to the new company. The court said:

"The grantee neither assumed nor took the property subject to, the liabilities of the grantor. * * *"

And the court added that—

"The Ohio Company was not the successor (or heir) of the West Virginia Company." (993.)

Apparently the court would have reached a different result if there had not been a covenant against assignment, and the word "successor" had been used.

Coming to the question of the validity of the patent to Dunkley it is first necessary to consider the date of his invention. His attempt to carry it back to August, 1902, seems to be met by an overwhelming

weight of testimony to the contrary. This weight of testimony is sought to be answered principally by that of Dunkley himself his son, and Mrs. Easterbrook, his sister-in-law, and the witness Harvey Schau, at present an employee of the Dunkley Company. There are other witnesses who in general seem to have been employees. The defendant in answering Dunkley's testimony has been obliged to go into the enemy's camp and in doing so has presented a great number of witnesses who knew nothing of a machine constructed in 1902. More than that, Dunkley, in his preliminary sworn statement in the Beekhuis interference proceeding, said:

"That he conceived the invention set forth in the declaration of interference during the month of August, 1902, that the invention was first disclosed by him to us during the month of September, 1902; that a drawing of the invention was made during the month of September, 1902; that he made no model of the invention; that the invention was first embodied in a complete working structure during the month of July, 1903. * * *"

Moreover, in the case of Dunkley Company v. California Canneries' Company Dunkley testified, on December 3, 1915, as to his original experimental machine, as follows:

"Q. When was the first put up? A. As near as I can remember, it was June or July of 1903."

It was not until the later litigations, when the date of the Grier machine came into question, that Dunkley

testified that a machine was constructed in the autumn of 1902. It is significant that no drawings such as Dunkley claims that he made in 1902 have ever been produced, and that the disclosure of his invention to his son substantially depends upon the testimony of these two interested witnesses. Judge Trippet has discussed this testimony carefully and has reached the conclusion that Stewart's testimony that he made the first machine in 1903 is correct.

The Norton letters in view of the close financial relations between Dunkley and Norton, and his apparent dependence upon the latter as a financial backer, strongly corroborate the position of the defendant.

In the various alleged anticipating devices which were exhibited to me at the time of the trial, the one which impressed me most was the Baker-Chalker machine. This seemed to work perfectly and the use of one like it at the Fresno Packing House of the California Fruit Canners' Association in 1902 was a clear anticipation of the patent in suit. No definite pressure is called for by the first patent to Dunkley, and the pressure which was used at the Fresno plant was evidently sufficient to peel a very large number of peaches.

The witness Fred Stebley was called for the first time before Judge (994) Trippet. He saw the operation of the Baker-Chalker machine in 1902, and testified as follows:

"Well, I observed that it was a new application of the machine which I had not seen before, and it was

being used as I say in which to remove the peel from peaches preparatory to canning and it was done in conjunction with—by using water in conjunction with the brushes."

There can be no doubt whatever that all this occurred in the summer of 1902. Stebley refreshed his recollection from a letter which he had written in July of that year, and Vernon died in December.

Horace G. Baker likewise testified before Judge Van Fleet in the San Francisco case as follows:

"Q. Describe the action of the water and of the brushes on the fruit as you observed it at that time. A. The brushes themselves turned this fruit over as they touched it and the water washed the skins off. There was not much left but this disintegrated soft pulp, like a pulp almost."

R. I. Bentley was likewise a witness who testified for the first time as to the Vernon use before Judge Trippet. He said that the whole pack of peaches at the cannery in the neighborhood of 100,000 cases, was peeled in 1902 by the Baker-Chalker machine. He said:

"The water had the effect of cleansing the brushes and the fruit."

He also said (at page 3697 of the Los Angeles record):

"Why, as I stated, there were three perforated pipes, one played on one brush and one on the other and on the fruit."

This testimony which was before Judge Trippet was significant. Moreover Mr. Bentley testified before me that 50 per cent of the pack went through in halved condition because it had not been pitted and was found difficult to handle after it was reduced to a pulpy condition by passing through the machine.

The Baker-Chalker machine was not before Judge Van Fleet and if it had been supplemented by the additional testimony that was before Judge Trippet I believe he would have had no doubt that a valid prior use was established. The very fact that there is testimony from Cobbey and Combs that in the afternoon when the water pressure was lower, they applied a pump to increase the pressure seems to show the use of the jets in peeling the peaches, and the identity of function between the Baker-Chalker machine exhibited to me and that of Dunkley is convincing evidence that the latter contributed nothing to the art which can be regarded as amounting to invention.

The specification of the patent in suit provides as follows:

"My invention consists in the means I employ to practically accomplish this object or result; that is to say, it consists, in combination with a peel or skin softening, disintegrating or shriveling means or device, preferably consisting of a tank or chamber containing a heated fluid, and a heater for the same, a conveyor for automatically conveying the peaches through the skin softening, disintegrating or shriveling device and subjecting the peaches to its action for uniform and measured time, a chute or device for delivering the

peaches in single file line to a brushing and washing mechanism, and a peach brushing and washing mechanism, preferably comprising a group of three long perforated pipes for spraying water upon the moving line of peaches, and subjecting them to a water brushing action, an endless belt brush arranged between the (995) two lowermost perforated pipes and operating to brush the peaches as they are rotated and to convey them along, and a pair of oppositely rotating cylindrical brushes operating both to rotate and brush the peaches, and having hollow perforated pipe cores for spraying the rotary brushes with water, and rotary cylindrical rubber sponge brushes, also having hollow perforated pipe cores for supplying the same with water; whereby the peaches may be very rapidly and cheaply and perfectly peeled, without waste or injury."

It is true that the claims in suit rely specifically upon jets of water as a means of peeling the peaches, but their language I think is to be taken in connection with the disclosure of the specification which certainly shows a co-operation of the brushes which carry the peaches with the peeling mechanism. A similar co-operation was exhibited in the Baker-Chalker machine. If the claims be read so broadly as to ignore the general form of mechanism described in the specification and shown in the drawings and to the extent of discarding the brushes, it would seem to me that the Pyle peach-peeling apparatus which employed no brushes to turn the fruit would read on the claims. In view, however, of the fact that the Pyle peach-peeling apparatus employed no brushes to turn the fruit and

that this mechanism seems an essential part of the Dunkley device, I shall not base my decision upon the alleged prior use of Pyle. Nor shall I rely, as Judge Trippet did, upon the Grier invention because of some possible uncertainty as to the date of the latter and the reduction of the invention to practical use. While I am inclined to agree with Judge Trippet that both of these devices are a bar to the complainant's patent, I prefer to rely upon the Vernon use of the Baker-Chalker machine.

As for the Roach prior use, I have some doubt as to its practicability in handling a large number of peaches, and never regarded either that or the McDermott process as having a close bearing upon the question of invention.

As it is my opinion that no invention was involved in the Dunkley patent, it is unnecessary to consider the question of infringement in the various devices before the court.

The second patent to Dunkley is for a process involved in the operation of the Dunkley machine, that is to say, for a mere function, and is therefore invalid. Risdon Iron & Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899; Westinghouse v. Boyden, 170 U. S. 556, 18 Sup. Ct. 707, 42 L. Ed. 1136.

For the foregoing reasons, the bill is dismissed, with costs, in respect to the first patent for lack of invention, and, in respect to the second patent, because it covers only the function of an apparatus already patented.

(Reprinted from 277 Fed. 996.)

DUNKLEY CO. v. CALIFORNIA PACKING CORPORATION.

(Circuit Court of Appeals, Second Circuit.

May 25, 1921.)

No. 231.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Dunkley Company against the California Packing Corporation. Decree for defendant, and plaintiff appeals. Affirmed.

Certiorari denied 255 U. S.—, 42 Sup. Ct. 54, 65 L. Ed. —.

Plaintiff as assignee and owner sues on two patents covering the inventions of Samuel J. Dunkley, viz., No. 1,104,175, for a "machine for peeling peaches and other fruit," and No. 1,237,623, for a "process of peeling peaches or other fruits or vegetables."

These patents rest upon a single application filed by Dunkley November 29, 1904—subsequently divided so as to separately produce the above referred to machine patent and process patent.

The history of these Dunkley patents is to be found in the reports. One Beekhuis applied on May 25, 1904, for patent upon "apparatus for removing the skin from fruit;" patent issued September 3, 1907, No. 864, 944. Beekhuis was subsequently put into interference with Dunkley and the latter succeeded in taking from Beekhuis what are now claims 19-22, inclusive, of the machine patent. Dunkley v. Beekhuis, 39 App. D. C. 494. (997.)

Beekhuis had assigned his patent to the California Fruit Canners' Association which then instituted in the Patent Office a "public use proceeding," which Dunkley sought to prevent by praying for a mandamus against the Commissioner. In this he was defeated (United States ex rel. Dunkley v. Ewing, 42 App. D. C. 176), but the Association above named withdrew its application for said proceeding on May 25, 1914. Thereafter the machine patent issued on July 21, 1914.

This left pending application for the process patent, which was put in interference with one Monte; the invention of the latter being owned by the same concern as the Beekhuis patent. In this interference Dunkley also prevailed in February, 1917 (Monte v. Dunkley, 46 App. D. C. 70), and thereafter Dunkley's process patent issued on August 21, 1917.

It is plain that Dunkley's real opponent in the Patent Office was the California Fruit Canners' Association, and cotemporaneously with the abandonment by that concern of its "public use proceeding," and for a nominal consideration the plaintiff herein executed a license to its opponent for and under whatever patents might be ultimately granted upon the Dunkley application of November 29, 1904.

This license is dated May 22, 1914, and the words here important are as follows:

"Now therefore, be it known, that for and in consideration of the sum of $10 in hand paid by the California Fruit Canners' Association unto the said Dunkley Company the receipt whereof is hereby ac-

knowledged, the said Dunkley Company does hereby grant unto the said California Fruit Canners' Association for the benefit of itself and its successors, a license free of royalties of any kind whatsoever, for the use of the said invention in connection with its business relative to the canning or treatment of fruit, granting unto the said California Fruit Canners' Association the free right for the use of any machine or machine or invention owned or controlled by the said Dunkley Company"—and covered by the patents expected to grow out of the application aforesaid.

The license agreement continues that it is granted "for the benefit of the said California Fruit Canners' Association and its successors for the full term of years of any letters patent which may hereafter be granted for the inventions" disclosed in the aforesaid application.

In August 1915, plaintiff sued upon its then recently granted machine patent in the Northern District of California, summoning as defendants numerous companies engaged in the canning of fruit, especially peaches, including the Griffin & Skelley Company and the Central California Canners' Company. In this case Dunkley prevailed. Central, etc., Co. v. Dunkley Co., 247 Fed. 790, 159 C. C. A. 648.

Within a fortnight after the lower court's favorable decision in the case just cited, this plaintiff began action against another alleged infringer in the Southern District of California. The process patent had not yet issued and suit was begun on the machine patent alone. Subsequently and in April 1918, the suit was

enlarged by supplemental bill so as to count upon the process patent also. It was then brought to trial and the bill dismissed, the trial court holding that the Dunkley machine invention could not be "carried back beyond the summer of 1903" and was under the evidence anticipated. That court was "clearly of the opinion that there is no validity at all" in the Dunkley process patent wherefore the bill was dismissed. The appeal resulted in affirmance, but upon the ground of noninfringement. Dunkley Co. v. Pasadena, etc., Co. (C. C. A.) 261 Fed. 386.

This present suit was brought before the decision of the District Court for the Southern District of California adverse to the patents. A. N. Hand, J., followed the reasoning, and reached the conclusion of Trippet, J., in the last-mentioned California case. But the issues in this litigation differ from those in any of the preceding causes. Here, as there, anticipation and lack of invention are advanced by the defense; but in addition there is a plea of license growing out of the following uncontradicted facts:

The California Fruit Canners' Association is a corporation of California. After it obtained the above-recited license it continued to carry on its busi- (998) ness until November 1916. At that time it sold, transferred, and assigned to this defendant, the California Packing Corporation (which is formed under the laws of New York), all its "business, franchise and property as a whole," including its good will and all its real and personal property.

It is not denied that this transaction was and is in accord with the law of California, which does not permit the the express merger and consolidation of corporations.

Defendant by its contract of purchase assumed all the debts, obligations, and liabilities of the California Fruit Canners' Association, and since the purchase aforesaid defendant has carried on the business of its assignor or predecessor. It has also acquired additional canning plants, including especially those of Griffin & Skelley and the Central, etc., Co., which were two of the unsuccessful defendants in the suit brought in the Northern District of California.

Since the sale in November, 1916, the California Fruit Canners' Association has done no business, but shortly after said sale its capital stock was reduced to a par of $3,000 and all its assets (except $3,000) were distributed among its stockholders. The defendant herein has acquired all of this $3,000 part of stock (except eight shares) and is now the holder and owner of the same.

The decree below (appealed from by plaintiff) held: (1) That defendant during all the times complained of was a licensee of plaintiff; (2) that both the patents in suit are "invalid, null and void."

Before Rogers, Hough, and Manton, circuit judges.

Hough, Circuit Judge (after stating the facts as above). The above statement shows that the license of 1914 was a settlement of expensive conflict between Dunkley and the Fruit Canners' Association; the con-

sideration is manifest entirely apart from the formal recital.

Two phrases of this document are especially important: (1) The association is licensed "for the benefit of itself and its successors" and (2) the privilege is granted for the use of the Dunkley invention "in connection with (the association's) business relative to the canning or treatment of fruit."

One preliminary contention may be put aside; it is suggested that, since the license is merely to use no one acting thereunder can make the licensed article. This is not true for "if the circumstances indicate such an intention, a license to use implies a license to make the thing to be used." Edison, etc., Co. v. Peninsular Light, Power & Heat Co. (C. C.) 95 Fed. 669, 676, citing cases. In 1914 all that Dunkley had were applications for two patents, one for a machine, the other for a process; and every circumstance points to the conclusion that his licensee was expected to make or have made whatever machine it desired to use; while, as for the process, it is difficult to see how any one can be licensed to use a process, without by necessary im-
(999) plication having the right to devise and build whatever apparatus exemplifying the process seems good to the licensee.

Considering the first phrase of the license agreement: While the word "successor" is a term of art, it is of the most general signification, meaning no more than "one who follows or comes into the place of another." Historically it is the equivalent, when applied

to a corporation, of the word "heir" in connection with a natural person. Bouv. Law Dict. and citations. In conveyancing it is necessary to insure more than a life estate in a corporation sole (Boston v. Sears, 22 Pick. [Mass.] 122), but, though usual, a grant to a corporation aggregate without the phrase is prima facie in perpetuity, inasmuch as the company is usually perpetual (Union Co. v. Young, 1 Whart. [Pa.] 410, 425, 30 Am. Dec. 212; Chancellor v. Bell, 45 N. J. Eq. 538, 541, 17 Atl. 648.)

Doubtless a license, without more, is but a personal privilege expiring by operation of law with the death of the licensed individual, or with the cessation of business life in the case of a corporate recipient (Keystone, etc., Foundry v. Fastpress Co. [C. C. A.] 272 Fed. 242, Op. filed Feb. 2, 1921), yet if the grant be also to heirs or successors it is plain that the property is descendible. Usually descendibility carried with it the quality of assignability, and it has been held that the words "heirs or successors" import assignability. Wood Harvester Co. v. Minneapolis, etc., Co. (C. C.) 61 Fed. 256, 258.

"Successor" is a plastic word, and "in modern acceptation has a broader significance than succession in respect to the estate of a deceased. It may mean * * * succeeding to a place, or a right, or an interest or a power, official or otherwise. It may mean succession in corporate control." American, etc., Co. v. Campbell, 138 Fed. 531, 534, 71 C. C. A. 55, 58.

Both from reason and authority we conclude that a grant to a corporation and its successors is a phrase

to be interpreted according to the surrounding circumstances. There can be no doubt that one corporation may be the successor of another, although there is neither a merger nor technical consolidation. Lightner v. Boston, etc., Co., 1 Low, 338, Fed. Cas. No. 8,343. Indeed, where what is ordinarily called consolidation occurs, the presumption (in the United States courts) is that all the constituent companies retain their corporate identity. Keokuk, etc., R. R. v. Missouri, 152 U. S. 301, 305, 14 Sup. Ct. 592, 38 L. Ed. 450. Two corporations may "remain separate legal entities and yet be merged for all practical purposes," as was said in Southern Pacific Co. v. Lowe, 247 U. S. 330, 337, 38 Sup. Ct. 540, 62 L. Ed. 1142; but always it is necessary to consider the connection in which words of succession, merger or consolidation are used.

The second phrase above quoted from the license shows that the Dunkley devices were to be utilized in a business; context and evidence prove that that business was the preserving of fruit, for which the peeling thereof was and always would be necessary. There was thus excellent reason for stating that the invention was licensed for use "in connection with" the association's business; and it is reasonable to read (1000) the phrase of succession in conjunction with the phrase relating to a business use.

A license is but "the right not to be sued," yet it is also a piece of intangible, incorporeal personal property, and, in the nature of its estate, does not differ

from any other privileges or (in a very broad sense) franchises.

It is this similarity which renders applicable to the matter in hand such cases as International, etc., Co. v. Smith County, 65 Tex. 21, and Grand Canyon, etc., Co. v. Treat, 12 Ariz. 69, 95 Pac. 187, affirmed 222 U. S. 448, 32 Sup. Ct. 125, 56 L. Ed. 265, where, speaking of the privilege of exemption from taxes as passing from the exempted corporation to one purchasing its property in foreclosure, the court held that—

"The word 'successors' is evidently used to designate such corporations or persons as may in any lawful manner acquire the proprietorship of the corporate rights and property through which they are to be exercised."

In these cases the privilege of exemption was held to be attached to the property and the "successor" reasonably and legally to be that company which "came into the place of" the original recipient of the privilege. In like manner, an easement (another piece of incorporeal but descendible property) has been held when granted to one "and his successors" to be attached to the business of a certain store and to pass with the business, Ainslie v. Eason, 107 Ga. 747, 33 S. E. 711.

Without any written license the doctrine here contended for by appellee was enforced in Wilson v. Wilson Corp. (D. C.) 241 Fed. 494, and in Lane, etc., Co. v. Locke, 150 U. S. 193, 14 Sup. Ct. 78, 37 L. Ed. 1049 it was held to be sufficient to work a succession to a license privilege enjoyed by a copartnership, that

the succeeding "company was organized upon the same basis as the firm; that the business of the company was to be the same as that carried on by [the firm], and to be carried on in the same premises; that the entire property and assets of the firm and its liabilities and obligations * * * devolved upon the company." This decision sufficiently discusses and distinguishes the earlier decisions.

Nor is it perceived that Niagara, etc., Co. v. Hibbard, 179 Fed. 844, 103 C. C. A. 330, favors appellant's contention, though much relied upon. In that case the patentee gave a corporation a ten-year license without any clause of succession. During the ten-year period, the licensee in question transferred all its property to a new company formed in another state, but the new concern did not assume the liabilities of the assignor. It was held that the second corporation was "not the successor or heir" of the original one. Plainly in that case there was no intention to make a perpetual grant. Again, it is of the essence of a legal succession that in all material respects the succeeding corporation should stand in the boots of the old one, and the deliberate omission to assume liability was itself enough to prevent that continuity of business and corporate life which is the essence of succession. (1001.)

Result is that when in due legal form this defendant succeeded not only to the business but (as proven) to the franchise, property, liabilities, and good will of the Fruit Canners' Association, it became within

the purpose and meaning of the license agreement the successor of the licensee.

It is urged that this result is an attack upon Dunkley's rights as assured in the case brought in the Northern District of California, because he there obtained injunctions against two canning companies which have now been acquired by this defendant. But this is a mistaken view of legal rights; the injunction referred to necessarily ran against certain corporations; it affected the corporate personalty, and a license likewise affects persons and corporations, and does not directly reach machinery and buildings. The Griffin & Skelley Company and Central California Company may well remain under injunction and be required to account; but that is no reason why an unlimited licensee of Dunkley's may not buy the property of these two enjoined corporations and under his license use on his own property and in his own business machines properly forbidden to the former proprietors.

Holding as we do that this defendant is the plaintiff's licensee we need not go further and consider the validity and scope of Dunkley's patents. On this point we express no opinion but affirm the decree below on the sole ground of license. Appellee will recover costs.

Supreme Court of United States. Dunkley Company, petitioner, vs. California Packing Corporation, respondent. Certiorari denied, October 21, 1921.

(Reprinted from 277 Fed. 1001.)

DUNKLEY CO. v. CENTRAL CALIFORNIA CANNERIES CO. et al.

(District Court, N. D. California, Second Division. August 22, 1921.)

No. 201.

In Equity. Suit by the Dunkley Company against the Central California Canneries Company and others. On motion to reopen decree. Denied.

See, also, 247 Fed. 790, 159 C. C. A. 648; 261 Fed. 203.

VAN FLEET, District Judge. The above-entitled cause and the seven similar causes by the same plaintiff, numbered in the margin, all involving the validity of the same letters patent, were heretofore tried together in this court in April, 1916, and on December 4, 1916, in accordance with an oral opinion by the court, an interlocutory (1002) decree was entered in each holding the patent valid and infringed and ordering an accounting. These decrees were thereafter in due course in all respects affirmed by the Circuit Court of Appeals (Central California Canneries Co. v. Dunkley, 247 Fed. 790, 159 C. C. A. 648), and its mandate of affirmance filed in this court on May 22, 1918. Thereafter on October 14, 1918, after the coming down of the remittitur, the present motion was interposed by the defendants asking that this court request of the Circuit Court of Appeals the withdrawal of its mandate of affirmance therein and that the causes be thereupon remitted to this court with authority to set aside its

decrees and all other proceedings therein, to reopen the same and permit the defendants to reform and amend their pleadings and thereupon to rehear said causes for the purpose of receiving certain alleged to be newly discovered, addition, and further evidence bearing on the validity of the patent involved and its infringement by the several defendants and upon such hearing to enter new and different decrees should the evidence warrant.

The grounds of the motion are, in substance, that subsequent to the entry here of said decrees in a suit on the same patent by this plaintiff and its assignee against another alleged infringer (Dunkley Co. et al. v. Pasadena Canning Co. 261 Fed. 203), tried before Judge Trippet in the District Court for the Southern District of this state wherein certain further and additional evidence was produced and heard which it is alleged could not with reasonable diligence be earlier discovered and was for that reason not available on the trial of these causes, the latter court rendered its decree on September 4, 1918, holding the patent void and dismissing the bill, which decree has thus resulted in a conflict of decision as to the validity of the patent and it is said will work confusion and result in hardship to the defendants; and it is claimed that the newly discovered evidence is of a character which would render it probable that on another hearing the patent would be held void by this court. There is a further and distinct ground that at the date of the hearing in this court the plaintiff herein had parted with all its

interest in the subject-matter of the suit by assigning its title in the patent pending the hearing to another corporation and for that reason it is claimed the decrees are void and should be set aside.

The motion was based upon affidavits as to diligence is discovering and the character of the newly discovered evidence largely as disclosed in the record in the cause heard in the Southern district and other evidence and documents to be produced at the hearing of the motion; and falling within the latter category, there was produced and relied on at the presentation the record of the evidence, proceedings, and decree in another and later suit brought by the assignee of the plaintiff, and decided by Judge Hand (A. N.) in the Southern district of New York, subsequent to the filing of this motion but before it was heard, in which the same patent was involved and wherein the decree, based substantively upon the same evidence as that produced before Judge Trippet was again in favor of the defendant (Dunkley Co. v. Cal. Packing Corporation, 277 Fed. 989.) (1003.)

While, as noted, the motion was entered here in October, 1918, its hearing was at the suggestion of the court postponed until the determination of the appeal then pending in the Circuit Court of Appeals, in the suit heard before Judge Trippet, in anticipation that the decision in the latter might facilitate a solution of the questions involved in the motion—and which, as we shall see, has contributed to that effect. That decision having been rendered (Dunkley Co. v. Pasadena

Canning Co. [C. C. A.] 261 Fed. 386), the motion has after some considerable delay been argued and submitted. Since the submission, an appeal in the suit in the New York case has been heard and decided. Dunkley v. California Packing Corporation (C. C. A.) 277 Fed. 996.

Motions of similar import are not without precedent in patent cases, but they are unusual, and the practice not uniform, and this fact doubtless led to some confusion in the minds of defendants' counsel as to where the jurisdiction rested. It appears that defendants first presented a motion to accomplish the same purpose and upon the same showing, to the Circuit Court of Appeals in these cases after its denial of a rehearing but before the remittitur had been sent down; but that court peremptorily denied the defendants' motion, without opinion, and by an order which is wholly silent as to defendants having leave to apply to this court for such relief. This action is now made the basis of an objection by plaintiff that the defendants are precluded from renewing the present motion here and that this court is concluded by the ruling of the Circuit Court of Appeals from granting the relief asked.

I was disposed at the argument to regard the objection rather lightly, but a more mature consideration of the authorities discloses that the question is not free from difficulty. That defendants in applying to this court are now pursuing the more usual and proper course in such instances is, I think, fairly to be gath-

ered from the cases on the subject; and had that course been taken in the first instance, the present objection could not have arisen. Barber v. Otis Motor Sales Co. (D. C.) 245 Fed. 945; Sundh Electric Co. v. Cutler-Hammer Mfg. Co., 244 Fed. 163, 156 C. C. A. 591; Wilson v. Union Tool Co. (C. C. A.) 265 Fed. 669. But this fact does not aid us. The defendants saw fit to first make the application to the Circuit Court of Appeals while the controversy was yet in its hands, and it ruled upon it. That that court had jurisdiction in a proper case to grant the relief no question is or could well be made. In re Potts, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994; Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., 259 Fed. 258, 170 C. C. A. 326. In the latter case the Circuit Court of Appeals of the Sixth Circuit, after rendering its decree, granted a similar application authorizing the lower court to reopen the cause without requiring a request from the latter. In the present case the Court of Appeals took cognizance of the motion and ruled on it, and apparently upon its merits—at least, there is nothing to indicate a more limited view—but it denied the relief, not merely without prejudice to an application here, but unconditionally and finally, and we must therefore assume that it so ruled because the application did not appeal to it as having merit. Of course, it is hardly necessary to suggest that where (1004) a question in a cause has been ruled by the higher court it becomes as to the court below the law of the case and the latter may not competently proceed in

contravention of it. As stated in Re Potts supra, where the lower court had taken a course not in pursuance of the mandate of the higher court:

"When the merits of a case have been once decided by this court on appeal, the Circuit Court has no authority, without express leave of this court, to grant a new trial, a rehearing or a review, or to permit new defenses on the merits to be introduced by amendment of the answer. [Citing cases.] In this respect a motion for a new trial or a petition for a rehearing stands upon the same ground as a bill of review, as to which Mr. Justice Nelson, speaking for this court, in Southard v. Russell, above cited, said: 'Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England; and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between the parties in chancery suits.'"

But defendants contend that they are not asking here the same relief they asked of the Court of Appeals; that what they are asking this court to do in no way runs counter to the ruling of the higher court; that what they asked there was for a direct order from that court reopening the decrees, whereas all they ask this court to do is to "request the privilege" of taking that action. The answer of the plaintiff is that

this is merely seeking the same relief by going the other way about—"whipping the devil around the stump," as it were—and I am inclined to take that view.

But however, the objection should be decided, is, in the view I take of the merits, of little moment in the present case. I say this for the reason that, after a very careful review of the voluminous record, I find myself able to take no more favorable view of this application than that indicated by the Court of Appeals; and there can be no transgression or disparagement of the ruling of the latter court by looking into the record for the purpose of stating my reasons for that conclusion.

The controversy involves the validity of United States letters patent No. 1,104,175, issued to one Sam'l J. Dunkley on July 21, 1914, for a peach-peeling device for use in fruit canning, a full and luminous description of which will be found in the opinion of the Circuit Court of Appeals above noted, upholding the validity of the patent.

The conception at once took rank as of great value in the fruit canning industry, one of great magnitude in this state and, as is not unusual in such circumstances, it has almost from the date of the application been beset by bitter and stubborn litigation instigated by adverse claimants against both branches of the application; it having been divided in the Patent Office to cover both the device patent here involved and a process patent. The application was filed November

29, 1904, and before the patents thereunder were issued, there had been interposed two interference proceedings and one so-called "public use proceeding," all emanating from the same source which had to run (1005) their course through the Patent Office and the courts of the District of Columbia, before patents were finally secured. Dunkley v. Beekhuis, 39 App. D. C. 494; Monte v. Dunkley, 46 App. D. C. 70; United States ex rel Dunkley Co. v. Ewing, Comm. Pats., 203 O. G. 603. And since the issuance of this device patent there has been a cloud of infringers, necessitating a large number of infringement suits, the first of which to come to trial being those in this district resulting in the decrees here involved. In view of the history of the litigation in the Patent Office, it was not surprising that when those suits came on for hearing it should be found that both parties were thoroughly prepared, the knowledge gained in the interference and other proceedings having made them entirely familiar with the questions they had to meet and the evidence required; and the cases gave indication of every effort having been put forth by both parties to meet those issues with every item of evidence that could be secured, and indeed that the cases had in all respects been thoroughly prepared, through able counsel, for a determined fight. As a result, the questions involved were very ably presented and no stone left unturned by either side. The whole controversy was made to turn on the same question substantially as that involved in the interference proceedings of anticipation or prior con-

ception, there being no claim of noninfringement and the validity of the patent as involving invention being conceded. As a result of such hearings, these decrees were entered; and, as noted, the decrees were after a full and painstaking consideration of the challenged sufficiency of the evidence fully sustained by the Circuit Court of Appeals in an elaborate opinion meeting every objection urged.

It is obvious that, with this prolonged history of bitter controversy over the fundamental question of priority which underlies these adjudications and where three several tribunals have, after the most mature consideration, successively reached the same conclusion, this court should not, without the most impelling reasons, set these decrees aside and open up the whole controversy anew. As I stated to counsel at the argument, I should not entertain the idea of opening up these decrees unless the showing satisfied me that the interests of justice demanded it in obedience to an unescapable conviction that a rehearing would probably change the result. The showing has fallen far short of disclosing such a situation, but, to the contrary, leaves me quite satisfied with the propriety of those decrees. I have taken pains, with the aid of a very complete index memorandum furnished by counsel, not only to carefully review the evidence introduced before me, but everything additional found in the records in both Dunkley v. Pasadena Canning Co. and Dunkley v. California Packing Corporation, presented for the first time before Judge Trippet in the

former case and later to Judge Hand in the latter, and in my consideration of the evidence I have had the benefit of the views and comments found in the opinions of both my learned brothers, which led them to an opposite conclusion with myself as to the validity of the patent; yet, nevertheless, I am constrained to say that with the highest consideration for the learning and ability of both, I am impressed with neither the character of the (1006) new evidence nor with the conclusions reached in those cases. That there was a cloud of "new" witnesses it is quite true, giving indication that the country had been raked with a "fine-toothed comb," so to speak; but there was little "new" evidence given by them—if the term be used to express the idea of material evidence. In fact, there is none aside from one or two items of so-called documentary proof which does not fall strictly within the characterization of the Supreme Court as being wholly insufficient in character as a basis to set aside or defeat an existing patent. In the very recent case of Symington Co. v. National Malleable Castings Co. *et al.,* 250 U. S. 383, 386, 39 Sup. Ct. 542, 543 (63 L. Ed. 1045), that court took occasion to say:

"This court has pointed out that oral testimony tending to show prior invention as against existing letters patent is, in the absence of models, drawings or kindred evidence, open to grave suspicion; particularly if the testimony be taken after the lapse of years from the time of the alleged invention. Deering v. Winona Harvester Works, 155 U. S. 286, 300."

There is a striking absence of anything in the nature of models, drawings, or memoranda produced to support the mere oral statement of these witnesses made in nearly every instance purely from memory, and this after a lapse of from 15 to 18 years; and as to the items of book entry and correspondence they were not only wholly inconclusive in their character, but made as strongly in support of the plaintiff's theory as to the date the invention was put in practice as that of the defendants'. Indeed, I regard the item referred to as the "Norton letters," to which much significance is attached, as making, in their sequence, when properly construed, entirely in favor of the plaintiff.

And singularly enough while the motion is based entirely on the newly discovered evidence as produced in the hearings before Judge Trippet and Judge Hand, neither of those learned gentlemen seem to have relied on it as the fundamental basis of his conclusion in determining the validity of the patent, but they both resort to evidence that had found a place in the controversy from the beginning.

For instance, Judge Trippet, after noting two or three items of book entry, in themselves of no definitive value, and referring to the Norton letters, contents himself by saying:

"There is other documentary evidence, such as the books of the Clark Engine & Boiler Company, which throw more or less light upon the controversy."

But without specifying anything further he proceeds to discuss the evidence of the witness Stewart L.

Campbell, the defendants' chief witness produced before this court on the subject as to when the first device of the Dunkley invention was constructed; and Judge Trippet shows quite clearly that it is largely upon the evidence of this witness that he bases his conclusion that plaintiff's patent had been anticipated. This witness had testified before this court that he himself was the one who conceived the Dunkley invention and constructed the first experimental device in 1903, and that it was not built in 1902 as testified by Dunkley. Of this testimony I had occasion to say in my opinion:

"The main reliance by defendant in the evidence is upon the testimony of the witness Campbell. * * * I indicated at the trial, and my mind has (1007) been only confirmed in that view by my review of the evidence, that I could not extend the limits of my credulity sufficiently to put credence in the testimony of Campbell."

When the cases got to the Circuit Court of Appeals, the appellants disclaimed relying on Campbell's testimony that he was the inventor of the peach-peeling device, but offered it only to negative Dunkley being the inventor. This attitude occasioned the Circuit Court of Appeals to say in its opinion:

"There is in the record the testimony of one Stewart L. Campbell, who was called as a witness by the defendants in surrebuttal, and who testified that he was employed by the Dunkley Company in constructing machinery from the first of 1902 to December 1904. According to the testimony of this witness he designed

and built, in August, 1903, a peach-peeling table, for which the plaintiff obtained the patent in suit, and this he did without any ideas from Dunkley as to its construction. In other words, his testimony is to the effect that he was the designer of the invention for which Dunkley received a patent. But defendants insist that the testimony of this witness was not introduced to prove that fact, and they refer to their answer as showing that it was not so pleaded as a defense. The purpose of this testimony, they say, was to discredit the claim of Dunkley that he was the inventor, and not to offer the defense that Campbell was the inventor. But the testimony of Campbell upon that question was material and relevant to the issue before the court, and was either true or not true. If true, Dunkley was not the inventor of the device claimed as his invention, and that would end the case. If Campbell's testimony was not true, he was testifying falsely concerning a material and relevant matter, and his testimony would for that reason be wholly rejected. 'Falsus in uno, falsus in omnibus.'

"But the defendants say they offer it only to prove that Dunkley was not the inventor. They stand on the priorities set up in their answer as defenses, namely, the priority of the Vernon patent for a process for peeling fruit and the Grier device for an apparatus used in conducting that process. They deny the priority of the Dunkley peach-peeling machine, and offer the testimony of Campbell to prove that fact. This they cannot do. They cannot offer this testimony as true to prove a material and relevant fact for one purpose, and discredit it for another purpose. If it is true for one purpose, it is true for any purpose. And as the defendants have refused to commend the testimony of this witness to the court as true for a pur-

pose to which it was relevant and material, we must reject it for the purpose for which it was offered, namely, to fix the date of the Dunkley constructed machine in 1903, instead of 1902."

Campbell's testimony was not materially different before Judge Trippet, but the latter does not advert to the aspect above discussed by the Circuit Court of Appeals, merely closing his consideration of the witness' evidence by saying: "There is no reason in any event for discrediting Campbell." I have carefully reviewed the particulars of the evidence as to which Judge Trippet seems to think it tends to corroborate Campbell, but I am wholly unable to change my former conclusion as to his evidence.

Basing his conclusion largely on the evidence of this witness, Judge Trippet found the Dunkley patent anticipated and for that reason void. He also found that the device claimed in that case to be an infringement, did not infringe the Dunkley invention; and it is significant that it was only on this latter ground that the Circuit Court of Appeals affirmed his decree dismissing the bill.

As to Judge Hand's opinion it is devoted largely to a question not (1008) here involved—whether defendants were protected by a license set up in defense—and on the question of anticipation he indulges, with a single exception to be noticed, in little original discussion, contenting himself with following and adopting the views of Judge Trippet. He starts out by saying:

"After hearing the testimony, I was very clear that the complainant had not a valid patent, and that the decision of Judge Trippet was correct."

And referring to Judge Trippet's views on anticipation, he says:

"Judge Trippet has discussed his testimony carefully and has reached the conclusion that Stewart's testimony that he made the first machine in 1903 is correct."

This reference is to Campbell's testimony, the learned judge inadvertently calling him "Stewart"—his first name. He then proceeds to some independent discussion and says:

"In the various alleged anticipating devices *which were exhibited to me* * * * the one which impressed me most was the Baker-Chalker machine. * * * The Baker-Chalker machine was not before Judge Van Fleet, and if it had been, supplemented by the additional testimony that was before Judge Trippet, I believe he would have had no doubt that a valid prior use was established. * * * The identity of function between the Baker-Chalker machine *exhibited to me* and that of Dunkley is convincing evidene that the latter contributed nothing to the art which can be regarded as amounting to invention." (Italics volunteered.)

In these extracts Judge Hand has inadvertently fallen into a singular error or misapprehension arising perhaps from the evidence before him having been largely stipulated into the case from the record before Judge Trippet and not heard orally. In the first place,

there was not before Judge Hand one of the Baker-Chalker machines as relied upon by defendants to anticipate plaintiff's device. What was before Judge Hand was a copy of the old original Baker-Chalker orange-washing device, remodeled or adapted from memory by Baker, one of the patentees, to represent that device as the witness testified to seeing it used experimentally in Fresno in 1902 for peeling peaches; and it had been admitted before Judge Trippet solely for illustrative purposes as representing, as nearly as the witness' memory could make it, the device as it was used in Fresno. It found its way before Judge Hand from being stipulated into the record and was only there for the same purposes as used before Judge Trippet. In the next place, all of the evidence as to this device, with a single exception, that was before Judge Trippet, was before me in the present cases, including that of Baker. The exception was the evidence of one Stebler—referred to by Judge Hand as "Stebley"—who saw the device used on one occasion in Fresno in 1902 or 1903 and, testifying purely from memory, said:

"Well I observed that it was a new application of the machine [Baker-Chalker] which I had not seen before, and it was being used as I say in which to remove the peel from peaches preparatory to canning and it was done in conjunction with—by using water in conjunction with the brushes."

It will be observed that the witness says nothing about how the water was being used, and consequently

his evidence was entirely valueless (1009) as showing anticipation of plaintiff's patented device, even if otherwise competent. But in fact, under the principles of the Symington Case, neither the evidence of Baker nor that of Stebler was competent to anticipate plaintiff's patent.

Of this Baker-Chalker device I had occasion to say in my oral opinion:

"As to the Vernon device, it had been in use in Fresno as early as 1902 or 1903. I am unable to hold that this device was an anticipation in its essential characteristics. It operated upon a fundamentally different principle. That was an adaptation to the purposes for which the plaintiff's device was used that of peeling peaches, of a device by Baker and another for scouring oranges for the market; it had a system of revolving brushes, and it used a saturation or douche of water for the purpose of softening the brushes and of washing the fruit; but the essential operative principle there was the brushes. They were for the purpose of scrubbing and washing the hard outer surface of the skin of the orange and of freeing it from mold and other detrimental substances which interfered with its marketability, and the essential principle was the operation of the brushes. The water was used, as I have suggested, only for a saturating and washing purpose. I may say, furthermore, that the patent itself did not call for the essential feature which I find characterizes the plaintiff's device, that is, of peeling jets of water, or water admitted at such a high pressure upon the fruit as to act itself as the primary means of washing the skin from the fruit; nor do I think that the manner in which the Vernon patent was used was

such as to suggest readily to the mind the idea that peeling jets of water would be efficient for the purpose for which the plaintiff's device was intended. The plaintiff's device operates upon quite a different principle. It has the rotating brushes, but has these peeling jets of water, which are themselves the efficient means of washing off the disintegrated skin of the peach after it has been put through the lye process, and the brushes serve the subsidiary purpose of agitating the fruit and of turning it for the purpose of presenting its different surfaces to the jets of water to enable them to do the efficient work of cleansing the skin after its disintegration by the lye bath; and I am therefore unable to hold that the Vernon device, which was subsequently patented—I think in 1905—can be regarded as an anticipation of the device or the conception embodied in the plaintiff's patent."

I may add that I have found nothing in the record, either new or old, tending in any way to change my views as there expressed.

As a result of his conclusions, Judge Hand found the patent void for anticipation, but he also found that the defendants held a valid license to use plaintiff's device and for that reason was not infringing. It was upon this latter ground alone that the Circuit Court of Appeals of the Second Circuit affirmed his decree, leaving the question of the validity of the patent untouched. As a result their decree, like that of the Circuit Court of Appeals of this circuit, lends no aid to defendants on the present motion.

In what has been said above of the adverse conclusions reached by my Brother Judges I need hardly

say that nothing is intended in a spirit of criticism, my sole purpose being to show that the case is not one where I am called upon to accept their conclusions as making in support of the present motion.

In view of the considerations suggested, to grant defendants' motion would, as it seems to me, do violence to a cardinal rule for the guidance of courts, that when parties have had full opportunity to be heard there should be a period to litigation. And in the practical adminis(1010)tration of the law a party has had full opportunity to be heard when he has been afforded a fair and reasonable opportunity.

As to the last ground of defendants' motion, that the decrees should be vacated for want of proper parties, it is antagonized by a counter motion by plaintiff to add as plaintiff in the several actions the name of the corporation to whom the present plaintiff's rights have been assigned pending the controversy. Leave to apply to this court for that privilege was heretofore granted by the Circuit Court of Appeals and, as the right is one which does not inhere in the merits of the controversy but is purely modal and formal that there may be proper parties to sustain a final decree, the plaintiff's motion should be granted.

Accordingly, the defendants' motion that this court ask leave to reopen the decrees is denied; that of plaintiff to add the new party is granted.

No. 3824

In the United States Circuit Court of Appeals

For the Ninth Circuit

CENTRAL CALIFORNIA CANNERIES,
vs. *Appellant,*
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

J. C. AINSLEY PACKING COMPANY,
vs. *Appellant,*
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

ANDERSON-BARNGROVER MANUFACTURING COMPANY,
vs. *Appellant,*
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

GOLDEN GATE PACKING COMPANY,
vs. *Appellant,*
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

J. F. PYLE & SON, INC.,
vs. *Appellant,*
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

HUNT BROTHERS COMPANY,
vs. *Appellant,*
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

GRIFFIN & SKELLEY COMPANY,
vs. *Appellant,*
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

SUNLIT FRUIT COMPANY,
vs. *Appellant,*
DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

PETITION FOR A REHEARING

On Petition for Leave to File in the Southern Division of the United States District Court for the Northern District of California, Second Division, an Original Bill in the Nature of a Bill of Review. Denied June 19, 1922.

KEMPER CAMPBELL,
California Building, Los Angeles,
FRANCIS J. HENEY,
FREDERICK S. LYON,
WILLIAM J. CARR,
PILLSBURY, MADISON & SUTRO,
Standard Oil Building, San Francisco,
Counsel for Defendants-Appellants and Petitioners.

FILED
JUL 1 1922

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PETITION FOR A REHEARING

On Petition for Leave to File in the Southern Division of the United States District Court for the Northern District of California, Second Division, an Original Bill in the Nature of a Bill of Review. Denied June 19, 1922.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petitioners respectfully request the Court to reconsider its decision of June 19, 1922, denying petitioners' motion for leave to file in the Court below an original bill in the nature of a bill of review.

Technicalities aside, petitioners appeal to those broad powers which distinguish courts of equity—they appeal to the conscience of the Court under circumstances which warrant relief, if relief in any litigation were ever warranted. Reduced to simplest terms, both the defendants and plaintiffs here have been making serious, urgent and expensive efforts for a number of years, to the end that this Court might, as speedily as possible, make clear and definite the rights of the respective parties. The net result now is that we are again referred to the Court below with no direction to that Court defining the action to be taken.

We respectfully submit that this Court should at least state that, in its opinion, the petition for leave to file the original bill should be granted. We can not but feel that such is the opinion of this Court at this time, and we most respectfully urge upon the Court that justice would be served by an expression of this Court to that effect. It would clearly be to the interest of all the litigants and, we believe, would be welcomed by all and also by His Honor Judge Van Fleet. In view of the past denial by Judge Van Fleet of our motion for a request to the Circuit Court of Appeals

for permission to reopen the case and admit the new evidence which was introduced at the trials before Judge Trippet and Judge Hand and by them considered so important as to justify a different judgment than was rendered by Judge Van Fleet, and in view of the fact that our motion before Judge Van Fleet was exhaustively presented, both by oral argument and by written brief, we must assume that, without further light or expression from this Court, a second application will meet a like denial. This will probably mean months, if not years, of delay and litigation. In the meantime accountings will have to be made by all the various defendants in this case pending final appeal. Thousands and thousands of dollars will necessarily be spent in further litigation. All this time and expense can be saved by one word from this Court at this time.

One of the judges of this Court, in his concurring opinion in this case, has recognized the power of this court to determine the question of the right to file the bill and the desirability of its doing so in this case, but he seems to be of the opinion that the decision of Judge Van Fleet was prematurely formed, and that we may assume that when the matter is properly brought before the court it will have a different consideration. As a matter of fact, however, the motion in the first place was presented in open Court with oral argument which was followed by voluminous briefs, and His Honor, Judge Van Fleet, kept the motion under consideration for two years and a half and then made an order denying it in an opinion of about five thousand

words, in which he expressly stated that he had given the matter the very fullest consideration. *The question of our right to a rehearing must sooner or later come before this Court for decision.* We submit that it is not only just but proper, in view of the long, vexatious and expensive litigation that this case has already entailed, that this Court decide the question at this time.

In the case of Dunkley Company et al. v. Pasadena Canning Company et al., No. 3316, the issue as to the Grier spray device was in fact squarely presented—litigants, counsel and the Court below so recognizing it, and the record clearly showing it. (Note—the so-called "spray device" is the one referred to by Judge Rudkin in the Pasadena case as "not involved" in that suit.) Our position is that the holdings of this Court in and *subsequent to* the opinion in the Pasadena case and the proceedings in that case for certiorari in the Supreme Court, under the peculiar circumstances of the issues, the record and the earnest insistence of *both* sides that said spray device *was necessarily involved*, must be construed either as holding (1) that the Grier spray device as used by the California canners does not infringe, or (2) that the Grier spray device anticipates.

Formalities in the background, the question to be decided is, shall the fruit industry of California pay tribute to patentee Dunkley? The lye peeling of peaches had developed to full commercial proportions in California before a single soul in this State had ever heard of Dunkley, or of his alleged invention. Dunkley has, therefore, in fact contributed nothing to the art in point of time or method.

Heretofore the cases involving the Dunkley patent have to some extent turned upon the point of the time when Dunkley produced his first machine. In the patent office, Dunkley and his witnesses testified upon oath that the spray part—"that wooden frame"—of his machine "was made in *July, 1903*". Before Judge Van Fleet, he changed his testimony, slipping his date back to 1902, and the trial court believed him. In subsequent litigations, careful and painstaking trial judges, Judge Trippet of the Southern District of California, and Judge Augustus N. Hand of the Southern District of New York—after a most thorough and extended investigation, both held the Dunkley story false. The Dunkleys were forced to change their testimony in vital particulars in these later cases, making crucial admissions, and there was indisputable new evidence in abundance. This is all before this Court in this proceeding.

The petitioners feel that it would be consonant with equity should this Court consent to consider the whole record in accordance with the intimation contained in the concurring opinion, and determine the right to file the bill. This would be a just procedure and one ultimately saving the time of the Court and relieving defendants of a portion at least of the burden of pursuing the unnecessarily intricate mazes of presenting a rightful defense in an already oppressive cause.

This suit has been pending seven years. Under the order rendered, it is obvious that the litigation has not further progressed. The trial Court will be confused. Counsel will urge opposite views as to the indications

of this Court, and the whole matter will ultimately be here again for solution.

In more formal language, the petitioners respectfully urge error in the ruling heretofore made upon the motion, as follows:

1. The Court has erred in failing to consider proceedings of this Court and of the United States Supreme Court subsequent to its written opinion in the case of Dunkley Company and Michigan Canning & Machinery Co., Plaintiffs-Appellants, v. Pasadena Canning Company and George E. Grier, Defendants-Appellees, Equity No. 3316, wherein and whereby the holding of Judge Trippet declaring Dunkley Patent No. 1,104,175 anticipated by Grier and others was in effect approved and affirmed.

2. The Court has erred in failing to note that the defendants in the Pasadena case were charged with using two different types of devices—the first of which was used during the entire season of 1914, and that this machine was precisely the same type of apparatus which is involved in the case at bar, and that the use of said machine was the most important issue in the Pasadena case, and that damages were claimed for such use, unless it is to be understood by the language of the opinion of this Court of June 19, 1922, that this Court has held said first Grier machine does not infringe.

3. The Court has erred in holding that:

> "There is no apparent conflict between the decree of the District Court for the Northern District of California, affirmed by this Court on appeal October 1, 1917, holding the Dunkley patent No.

1,104,175 valid and infringed, Central California Canneries Co. v. Dunkley Co., 247 Fed. 790, and the decree of Judge Trippet in the Southern District of California as affirmed in this Court in the same case on appeal, 261 Fed. 386."

4. The Court has erred in not granting defendants-appellants' petition for leave to file in the Southern Division of the United States District Court for the Northern District of California, Second Division, an original bill in the nature of a bill of review.

5. The Court has erred in restricting defendants to the authority "to file in the lower Court an appropriate petition for a rehearing", and in authorizing that Court "to entertain and make disposition of the same".

This petition is based upon all of the records and files in this case (which now include the records and files in the Pasadena case).

CENTRAL CALIFORNIA CANNERIES,
H. Z. Baldwin, Secretary,
J. C. AINSLEY PACKING COMPANY,
J. C. Ainsley, President,
ANDERSON-BARNGROVER MANUFACTURING COMPANY,
W. C. Anderson, President,
GOLDEN GATE PACKING COMPANY,
E. E. Chase, President,
J. F. PYLE & SON, INC.,
H. T. Pyle, President,
HUNT BROTHERS COMPANY,
G. H. Bradt, General Manager,
GRIFFIN & SKELLEY COMPANY,
Andrew Griffin, Secretary,
SUNLIT FRUIT COMPANY,
P. E. Bush, Vice-President.

I hereby certify that I am one of the attorneys for petitioners herein; that the foregoing petition has been prepared, signed and filed by their direction and authority; that the allegations contained in said petition are true to the best of my knowledge and belief, and that said petition is in my opinion, well founded and is not presented for the purpose of delay.

KEMPER CAMPBELL.

Discussion.

The opinion of the Court and order upon which a rehearing is asked is reproduced herein as an appendix hereto.

THE RECORD CLEARLY SHOWS THAT THIS COURT HAS IN EFFECT HELD EITHER (a) THAT THE TYPE OF MACHINES INVOLVED HERE DOES NOT INFRINGE, OR (b) THAT THE PATENT IS ANTICIPATED BY GRIER AND OTHERS. REHEARING SHOULD THEREFORE BE ORDERED.

In the case of Dunkley Company et al., v. Pasadena Canning Company et al., there were *two* alleged infringing machines involved: (1) A shaker spray type employed during the season of 1914 (and upon which probably 1000 tons of peaches were peeled that season, Rec. p. 338), and (2) the so-called "Pasadena Washer" used by defendants thereafter. As to the first machine (called "Grier's first machine"), Judge Trippet held the patent anticipated by Grier and others. As to the second, Judge Trippet held that this machine did not infringe. On appeal the decree below dismissing the bill was affirmed without qualification, but Judge Rudkin inadvertently incorporated the following language in his opinion:

> "the question of infringement was not there involved because the Grier machine or device then before the court is not involved in the present case."

MOTION TO REHEAR—PASADENA CASE.

Thereupon, the appellants, Dunkley Company and Michigan Canning & Machinery Co., filed a "Motion to

Re-hear'' in which was clearly pointed out the error of the above statement in the opinion. We quote from appellants' (Dunkley Company and Michigan Canning & Machinery Co.) motion on file in case No. 3316, and now a portion of the record here:

> ''Rehearing is Requested Because the Court has Failed to Consider Grier's first Structure, which is Identical with that Held to Infringe in the Former Decision of this Court. See Assignment of Error 63.
>
> ''In the event that this Court affirms the decree of the Court below dismissing the bill of complaint, it may be hereafter contended that the structure, which this Court formerly held was an infringement, is now held not to infringe. We apprehend that this Court had no intention of entering such a diametrically opposed order, and hence we bring the matter to the attention of the Court for a rehearing to avoid the confusion that would thus follow.
>
> ''In this case the main defendants' machine sued on in the original bill of complaint is identical in structure with the defendants' structure held to infringe in the Central California Canneries case, 247 Fed. 790. Defendant Grier built both machines, and this machine of the defendants here was used after notice and during the peach season of 1914, by both the defendants herein. (The Pasadena structure was later and was brought in by supplemental bill.)
>
> ''*Thus an order of this Court affirming the decree of the Court below is, on the face of the pleadings and proofs, a substantial holding that the structure held to infringe in the first case is not an infringement here. The result will apparently be two diametrically opposed orders in force at the same time.* * * *'' (Italics ours.)
>
> ''Evidently we failed to bring home to this Court the fact that the machine that was held to infringe there was a structure made by Grier, and

that a machine of precisely similar structure was used by Grier and the Pasadena Canning Co., in violation of plaintiffs' rights. This is made the subject matter of Assignment of Error 63, which assignment is in the following language, Rec. p. 14, Vol. XI:

> '63. The Court erred in not holding that the machine of George E. Grier before the United States Court of Appeals for the Ninth Circuit, appearing in exhibit, Certified Copy of Record of Appeals, pages 27-35, inclusive, and also exemplified in Plaintiffs' Exhibit No. 9, is an infringement of patent No. 1,104,175, and that the use thereof constitutes an infringement of the process patent No. 1,237,723.'

"(Exhibit No. 9 is appended hereto.)

"This is defendants' first structure and is discussed at p. 240 of plaintiffs-appellants' main brief, under the heading,

'Infringement is Clear. Assignments 62 and 63.'

* * *

"We also urged this same thing in the 'conclusion' of our main brief, in paragraph at bottom of p. 255 and top of p. 256, which we here repeat:

* * *

"Defendants-appellees treat this earlier structure as in the case, at pp. 541-2 of their brief, under the title of

'Non Infringement'

as follows (bold face type by plaintiffs counsel):

* * *

"We believe this Court has no desire to order the affirming of a decree dismissing the bill of complaint where it thus appears that the defendants had been making use of a machine identical in structure with the machine held to infringe in the Central California case, supra. We do not believe this Court intended to approve two diametrically opposed decrees. This contention is now possible,

> and we urge on the Court that the matter be cleared up.
>
> "We therefore respectfully request a rehearing on this particular Assignment of Error 63. We believe the error is due purely to oversight, and that the same can readily be corrected from a consideration of matters already in the briefs without further argument. This earlier structure, exemplified in Exhibit No. 9 hereto appended and illustrated in the Exhibit A, Record of Appeals, pp. 27-35, should be held to be an infringement."

While we have here reproduced but meager portions of the petition, *this point was the basis of the motion* to rehear Dunkley Company's appeal in the Pasadena case and the matter was thoroughly gone into in the "Discussion" appended to the petition. The petition was denied.

NOTE: There was no concession by defendants in the case at bar as intimated in the "Discussion" referred to, that the first Grier machine infringed if subsequent. The stipulation was merely to the effect that defendants used the first Grier type of machine. Non-infringement was pleaded by defendants and is still urged.

In the Pasadena case (261 Fed. 386) this Court speaking through Judge Rudkin held:

> "Under the Dunkley patent the fruit is delivered into an endless conveyor, and passes between rotary brushes for a distance of about six feet; the brushes rotating the peach as it passes along, so that every portion of the surface is subjected to jets of water striking the fruit tangentially from perforated pipes arranged along the passage, and driven with such force as to remove the disintegrated skin

remaining on the peach and cleansing the particles from the brushes." * * *

"The art of peeling peaches by the use of hot caustic soda or lye, and then removing the disintegrated skin by the use of water, was well known years before the application for the Dunkley patent was made. The manner of using the caustic soda or lye was always the same, but the mode of removing the disintegrated skin varied from time to time, from merely dipping the peaches in water in a perforated bucket, to the use of a common hose. *In view, therefore, of this prior state of the art, the Dunkley patents must be limited to the particular means employed, and those means must be limited to directing peeling jets of water upon the fruit as described in the patent.* For if the patent should be construed to cover every possible means for removing the disintegrated skin by the use of water it would grant an unwarranted monopoly, and, furthermore, the patent would be rendered utterly void because of anticipation and prior use." (Italics ours.)

In commenting upon the foregoing language, this Court's opinion herein states:

"It held that the Dunkley patents were limited to the particular means employed for removing the skin of fruit after treatment, and as so limited, the patents were not infringed by the defendants in that case."

Judge Hand in the case of Dunkley Company v. California Packing Corporation, 277 Fed. 989, also has held that the circular bristle brushes for the turning of the fruit is "an essential part of the Dunkley device."

MOTION TO REMAND AND REOPEN—PASADENA CASE.

After the denial of the motion of Dunkley Company, et al., to rehear, another motion was presented by said appellants, the same being set down for oral argument and being earnestly and elaborately presented before this Court, consisting of Circuit Judge Gilbert presiding, Circuit Judge Hunt and District Judge Wolverton. The motion was

> "for an order to remand with leave to reopen the case to make the proofs complete, or, in the alternative, that the court in its mandate direct the District Court to enter its decree without prejudice as to said Exhibit 9 (the Grier first machine)".

In the argument counsel for both parties pointed out that the 1914 first Grier spray device was in the case and that the litigation had been tried upon that theory at an enormous cost to the litigants. The patent in suit issued July 21, 1914, prior to the 1914 peach season. Grier did not install his Pasadena washer until *one year later, 1915*. The following excerpts from the records were read or epitomized to the Court: See transcript of record Dunkley et al. v. Pasadena Canning Company et al., No. 3316:

> (Pages 1309-1310): "(The Court and counsel above named visiting the plant of the Pasadena Canning Company for the purpose of the inspection of machinery, the following discussion ensued):
> * * * * * * * *
>
> "Mr. GRIER. This is the old original machine.
> * * * * * * * *
>
> "Mr. LYON. The delivery of the peaches, as carried out there, is onto the old original first Grier Machine; not the one that was used here, but the one that was used in Los Angeles, at the East Side

Cannery; and after you get beyond this 'grasshopper' it is all the original machine, being Exhibit K of the San Francisco case.

"Mr. CHAPPELL. This is photographed in the San Francisco record, in case No. 203.

"(Court produces photograph.)

"Mr. HENEY. This is a photograph of the alleged interfering [infringing] machine. We will operate in a little while now."

(Pages 1311-1312): "Mr. LYON. Water is turned on the old Grier first machine to illustrate the spray of water on the peaches.

"The COURT. That is all it does—just shake them back and forth?

"Mr. CHAPPELL. Yes, running the peaches under the spray and vibrating them as they advance.

"The COURT. And turning them over as they fall down these steps?

"Mr. CHAPPELL. Yes.

* * * * * * * *

"The COURT. What do you call this—a vibrator?

"Mr. GRIER. It is the shaker, we call it.

"(Machine being operated by power.)

"Mr. LYON. You will notice the baffles in there may choke, so that all peaches have to absolutely come under that last spray.

"Mr. HENEY. About what pressure is on there now, Mr. Grier?

"Mr. GRIER. That is now about 30 pounds.

"(Small quantity of whole peaches run through 'grasshopper' and pass on out under observation of court.)

"Mr. HENEY. What pressure do you work it on when you run the peaches through to peel (referring to shaker)?

"Mr. GRIER. Well, we had about 60 pounds on this machine.

"Mr. HENEY. And that is about how much now?

"Mr. GRIER. Oh, I would judge about 35 or 40 pounds. We had a larger pipe here when we ran it regularly.

"Mr. LYON. After they leave this spraying machine, here is one tank that runs water through, and you will notice they go from that into another, and another, and finally it dumps them out onto the conveying devices."

Hearing resumed at court room—Testimony of George E. Grier.)

(Page 3511): "Mr. HENEY. I show you Exhibit B-2 in the San Francisco case, and ask you if that is a photograph of the machine about which I have been just asking you, and which I have referred to as the grasshopper or shaker machine.

A. Yes, sir; that is the machine."

(Page 3528): "The COURT. Well, I will overrule the objection. This suit, Mr. Chappell, was pending at the time these letters were written and involved this previous invention. This suit involves the previous machine made by this defendant, and previous alleged infringment, doesn't it?

"Mr. CHAPPELL. Yes. At the time this was written the process patent had not been included by the amendment.

"The COURT. Well, you don't understand. This litigation involves any liability that the defendant may be liable to to the plaintiff concerning what is known as the grasshopper and shaker machine."

(Page 3547): "Q. By Mr. Chappell. When did you construct the machine which you showed to Mr. Dunkley in the spring of 1915? [Pasadena washer —second machine.]

"A. I constructed it in the spring some time after the first of the year.

"Q. You had never peeled any peaches with it at that time, had you?

"A. No, sir."

There is also in the Pasadena record, at pages 666-7, the following (excerpt from opening statement of Mr. Chappell, counsel for Dunkley Company):

> "* * * Over here is a structure that did double duty at San Francisco (indicating). It was said to be an anticipation, and the proofs developed it was an infringement, and was held to be an infringement there. Peaches drop at this point, and come down to this step, and as they step here are turned over the other side up. And this whole part is a shaker, something like——
>
> The COURT. A vibrator.
>
> Mr. CHAPPELL. Something like a fanning mill shaker; it has a motion similar to a fanning mill shaker. And these pipes with spray nozzles on were disposed there (indicating).
>
> * * * * * * *
>
> Mr. CHAPPELL. The peaches that came down through there were sprayed on one side, until they came to this point, when they tumbled down one step, and that turned them over, and they were then sprayed on the other side.
>
> We stipulated the illustrations that might represent the defendants' machine in that case. We are somewhat surprised to find they also offer proof it was an anticipation. The court held it was not an anticipation, but an infringement in that case.
>
> *This structure was sworn to by Mr. Grier in that case to have been in use in the season of 1914, and is the first structure charged to infringe in this case.*"

NOTE. The testimony hereinafter quoted from the record in the case at bar was read into the Pasadena record and is a part thereof (Pas. Rec. pp. 3820 et seq.)

(Page 3825): "I continued to use the machine which I built in 1903 in the Pasadena Company's plant until the end of the 1914 peach season. I used it continuously every year."

* * * * * * *

"I identify Defendants' Exhibit B 1 to 8, as photographs of the East Side machine built in 1903."

(Page 3830): "I had received a notice about the Dunkley patent here in suit before I discontinued the use of the machine. I had the design of the other machine in my head before I received that notice. I discontinued the use of the shaker and spray machine because soft freestone peaches were washed away frequently with these sprays. It was practically ruining our business and the canning business by peeling peaches that were too green. We could peel clings. They are like a piece of rubber, but freestone peaches we would ruin the industry with them by doing it. The jet of water would cut out too much of the freestone peaches away. We could peel the green peaches."

Testimony in the case at bar was also cited as follows:

(Page 315): "Q. You stated, Mr. Grier, that in 1903 you built two of these machines. How long did you continue to use the one in the Pasadena Canning Company's plant?

"A. Until the end of the 1914 peach season.

"Q. Did you use it each year?

"A. Continuously, yes, every year.

(Page 320): "Q. January, of this year?

"A. Yes.

"Q. And this tank and shaker and spray-pipe of Defendants Exhibit "K" (referring to photographs of Defendants' Exhibit K, one of Grier's first devices) are part of the machine of the East Side Canning Company?

"A. Yes.

"The Court. He has said that several times.

"Mr. Miller. It is all leading, anyway.

"The Court. I pay attention to the evidence as it comes in. It is not necessary to repeat it.

"Mr. Lyon. I did not want any chance taken as to the identification. That is all."

In addition to the foregoing, other testimony bearing upon this matter may be found at pages 3510, 3511, 3512, 3513, 3514, 3515, 3516, 3518, 3519, 3521, 3529, 3536, 3822, 3823, 3824, and 3829 of the Record on Appeal in the Pasadena case.

Both sides urged this Court that the statement of Judge Rudkin was an obvious inadvertence in view of the record and the briefs. But counsel for appellees therein urged that the same matters had already been presented to this Court in appellants' petition to rehear, and had had the Court's due consideration; that it was inconceivable that under a conceded condition of the record the real issue in the case had been wilfully ignored by the Court, and that therefore by the Court's denial of the motion to rehear the Circuit Court of Appeals had affirmed Judge Trippet as to the 1914 machine, either upon the ground that the 1914 machine did not infringe or that the spray feature of the Dunkley device was anticipated.

At the conclusion of the argument (reported and filed) Presiding Judge Gilbert, after consultation with his colleagues, announced from the bench:

"It occurs to the court that the only question here is whether or not a sentence in the opinion of this court should be corrected or modified, and that matter will be sent to the judge who wrote the opinion of this court on the merits of the case. We were very firmly of the opinion that the deci-

sion of the court below should be affirmed. The present motion will be denied. It is possible that the sentence in the opinion referred to may be corrected."

CERTIORARI—PETITION AND RESPONSE. PASADENA CASE.

Thereupon, appellants, Dunkley Company and Michigan Canning & Machinery Co., petitioned the United States Supreme Court for a Writ of Certiorari. We reproduce quotations from their petition:

"In a petition to rehear, the attention of the court [Circuit Court of Appeals for the 9th Circuit] was then directed to its apparent error in that behalf, and assignment of error 63 was particularly brought to its attention, pointing out the claimed infringement by the said Grier first structure in the following language, Rec. Vol. XI, p. 14:

(Here follows assignment of error number 63 heretofore quoted.)

"Plaintiffs-appellants pointed out that that structure, Exhibit 9 (the Grier first structure), had also been submitted in the briefs for both parties without objection, and was identical with the structure passed upon in the former decision, 247 Fed. 790.

"This petition to rehear was denied in an order of the Court of Appeals entered January 5, 1920, thereby refusing consideration to the matter urged. The opinion of the Court of Appeals stands unchanged.

"Thereupon, the court having persisted in its holding that the device was not before it, motion was made for an order to remand with leave to reopen the case to make the proofs complete or, in the alternative, that the court in its mandate direct the District Court to enter its decree without prejudice as to said Exhibit No. 9 (the Grier first machine).

"On hearing of this motion, before Gilbert, Circuit Judge, presiding, Hunt, Circuit Judge, and Wolverton, District Judge, (Judge Rudkin, the writer of the opinion, not present), defendants-appellees' counsel, Mr. Campbell, appeared. He in open court brought to the attention of the Court that the alleged infringing device, Exhibit No. 9, was before it. He said, Rec. Vol. XI, p. 49:

" 'Counsel' (referring to counsel for appellants) 'made it very clear in his discussion appended to that petition' (referring to the petition to rehear) 'that this machine was in the case below, was considered by counsel upon both sides and by the court.'

"He says further on, Rec. Vol. XI, p. 56:

" 'I will read briefly from the testimony to show how clearly all this appears in the record.'
"and then read from Mr. Grier's testimony, identifying the Grier first structure as in use by defendants after the Dunkley patent issued and after notice of infringement and prior to the bringing of this suit, and on the subject as to whether that structure was in the case, counsel for defendants-appellees at Rec. Vol. XI, p. 58, say:

" 'It is just as clear as the English language can make it, and it is in the record time after time that that machine was used.'

"Then to make it emphatic, counsel for defendants, says:

" 'If there is any possible, conceivable doubt about it, we are willing to stipulate that that machine was used during the season of 1914.'

"Then to make it doubly clear and emphatic counsel for defendants-appellees further said:

" 'The entire case was tried upon that theory. Nine-tenths of the evidence in this voluminous record is directed to that point. The case was so argued; it was so considered by the court below, and it was so argued here upon appeal, and so briefed upon appeal, and the matter has been di-

rectly called to your Honor's attention in a petition for a rehearing, and the matter has been concluded by your Honor's ruling denying the petition for rehearing.'

"There followed considerable discussion. Thereupon the Court said:

" 'Judge Gilbert: It occurs to the court that the only question here is whether or not a sentence in the opinion of this court should be corrected or modified, and that matter will be sent to the judge who wrote the opinion of this court on the merits of the case. We were very firmly of the opinion that the decision of the court below should be affirmed. The present motion will be denied. It is possible that the sentence in the opinion referred to may be corrected.'

"See proceedings, Rec. Vol. XI, p. 61 (Note that Judge Rudkin wrote the opinion).

"The order denying the motion was entered on February 2, 1920, Rec. Vol. XI, p. 62. Thereafter Judge Rudkin, the writer of the opinion, changed the single word 'appellants' ' to 'appellees' ' in identifying the Pasadena machine or Grier's second structure. * * *

"The Court thus, although repeatedly urged by plaintiffs-appellants' counsel, as to fact of said first Grier machine being in the case, which fact was conceded most emphatically in open court by defendant-appellees' counsel, persisted in its opinion that the said Grier first structure in question is not before it. This is done, notwithstanding that the matter was submitted to it by briefs by both parties, and that there was never any objection to the proofs by counsel for either party, either in the trial court or in the appellate court. By such refusal the plaintiffs-appellants' are substantially denied a hearing and their day in court.

"The language of the opinion at Rec. Vol. p. 32, thus stands, viz.:

> " 'the question of infringement was not there involved, because the Grier machine or device then before the court is not involved in the present case.'
>
> "This ruling is contrary to the evidence and to the concessions and statement of counsel for both sides, and is wholly unwarranted by the record. The insufficiency of the evidence is ruled by the court of its own motion, in the appellate court, without opportunity for correction, modification or relief."

In reply respondents, Pasadena Canning Company and G. E. Grier, stated that if the United States Supreme Court was of the opinion that the Circuit Court of Appeals for the Ninth Circuit had not passed upon the merits of the case as to the 1914 machine, then respondents would unhesitatingly join with the petitioners in requesting the Court to take cognizance of the case. Respondents therein presented this phase of the matter to the Supreme Court as follows:

> "Petitioners not Denied a Hearing.
>
> "Was the legal effect of the proceedings in the Circuit Court of Appeals subsequent to the handing down of the written opinion, a refusal of that court to pass upon the issues necessarily before it with the first Grier machine in the case, or as expressed by counsel for petitioners, an adherence to the statement contained in the original opinion that the machine was not involved? If so, we unhesitatingly join with the petitioners in requesting this court to take cognizance of the case. It would, indeed, be a grave judicial wrong for parties to be turned out of court without a determination of issues actually presented and necessary to be decided to a complete disposal of the controversy, especially when both parties had gone to heavy expense in litigating these very issues.

"But we respectfully insist that the Circuit Court of Appeals has disposed of these very issues adversely to the plaintiffs. The issues and the necessity of a decision thereon were forcefully presented to the court in the petition for a rehearing. In view of the petition, the court could not very well have been in any doubt as to the first Grier machine being in the case. When the court denied a rehearing, the effect of its order was to resolve the issues thus specifically called to its attention and before it against the plaintiffs. The court adhered to its judgment of affirmance of the decree appealed from. The issues were all purely issues of fact. The only question was whether the findings of the trial judge were 'supported by the credible testimony of reputable witnesses'. (Butte & Superior Copper Co. v. Clark & Montana Realty Co., 249 U. S. 12, decided March 3, 1919.) No discussion of these issues was necessary. The effect of an adjudication is not dependent upon a written opinion. (Napa Valley Electric Co. v. Railroad Commission, decided by United States Supreme Court, January 19, 1920, and reported in U. S. Supreme Court advance sheets, Feb. 15, 1920, p. 202.) A denial of a petition for rehearing may be a binding determination of issues presented by the petition. (Mayo v. Washington, 122 N. C. 5; 40 L. R. A. 163, 166.)

"That the court considered its denial of a rehearing, under the circumstances a disposition of these issues, is quite plain from the statement delivered on February 2 at the conclusion of the argument upon plaintiffs' supplemental motion, when it was said, among other things:

" 'We were very firmly of the opinion that the decision of the court below should be affirmed.'

"While it might have been gratifying to counsel to have had Judge Rudkin rewrite his opinion, we can very readily appreciate how he considered such

a course unnecessary. The issues had been fully determined by the denial of a rehearing. The effect of the denial had been construed by the court. Indeed, to argue otherwise would be to cast an unwarranted reproach upon our judicial processes.

"And it is significant that petitioners themselves, at points in the petition, recognize that the effect of the action of the Circuit Court of Appeals was to determine these very issues adversely to them (p. 2 of Petition)."

CONCLUSION.

In view of the foregoing *record* of proceedings in the Pasadena case, both in this Court and in the United States Supreme Court, unless it be assumed that this Court refused to pass upon the most essential and the most important issue in a case carefully, elaborately and expensively presented before it, an unwarranted assumption we are sure, it must follow that this Court has either held (a) that the first Grier shaker and spray machine (the 1914 use) did not infringe (overruling the decision of Judge Van Fleet in the case at bar), or, (b) that Judge Trippet's decision declaring the Dunkley spray device anticipated was affirmed.

In either case it is respectfully submitted that this Court should direct the lower court to grant leave to the appellants to file in the Southern Division of the United States District Court for the Northern District of California, Second Division, "an original bill in the nature of a bill of review".

Respectfully submitted,

KEMPER CAMPBELL,
FRANCIS J. HENEY,
FREDERICK S. LYON,
WILLIAM J. CARR,
PILLSBURY, MADISON & SUTRO,
Counsel for Defendants-Appellants and Petitioners.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

No. 3824

In the United States Circuit Court of Appeals for the Ninth Circuit.

CENTRAL CALIFORNIA CANNERIES COMPANY ET AL.,
Appellants,

vs.

DUNKLEY COMPANY (now known as MICHIGAN CANNING & MACHINERY COMPANY) and DUNKLEY COMPANY,
Appellees.

Before MORROW, and HUNT, Circuit Judges, and DIETRICH, District Judge.

MORROW, Circuit Judge:

These suits, consolidated by stipulation of the parties, were commenced August 6, 1915, by the Dunkley Company. They are for injunctions restraining the defendants from infringing plaintiff's patent No. 1,104,175 for a device for peeling peaches and other fruits. Plaintiff's assignor, Samuel J. Dunkley, made application for the patent in suit on November 29, 1904. The application was for "the improvement in machines for peeling peaches and other fruit", patent on which was

issued July 21, 1914. In the progress of this application through the Patent Office, eight claims were added for "the process of peeling fruit and vegetables". The Examiner held that the applicant was not entitled in his machine application to prosecute claims for the process of peeling peaches, which process constituted a subject matter of invention distinct and different from that involving claims for the machine. The applicant thereupon cancelled these claims for the process in the machine application and incorporated them in an application dated June 25, 1914, for "the process of peeling peaches and other fruits and vegetables". Upon this application patent No. 1,237,623 was issued to Dunkley, August 21, 1917.

Interference was declared by the Commissioner of Patents September 3, 1907, with patent No. 864,944 issued to Beekhuis, September 3, 1907. The file wrapper shows that priority of invention and use was under critical and extended examination by the officers of the patent office for five years. All the tribunals of the patent office found that Dunkley was the first to conceive and reduce to practice the mechanism of the apparatus, provided he was entitled to make the claims of the issue. The decision turned upon the effect of the words "peeling jets of water" which are found in each of the claims. The Commissioner awarded priority to Beekhuis. Dunkley appealed from that decision to the court of appeals for the District of Columbia. That court, in a decision rendered January 6, 1913, held that:

"Dunkley was the first to invent and put into practice a rapid and effective machine for peeling peaches. This comprised in the combination the jets of water which he evidently realized aided in the removal of the skins when disintegrated by the alkali solution. That he did not realize the full extent of their agency cannot deprive him of the benefits accruing from their use. His specifications and construction afforded sufficient foundation for the claims; and as he was the first to conceive the idea and reduce it to successful practice, he is entitled to the award of priority."

The decision was certified to the Commission of Patents. Dunkley v. Beekhuis, 190 O. G. 267; 39 App. D. 494.

Award of priority of invention and use was accordingly given to Dunkley by the Commissioner of Patents on June 16, 1914. A patent was thereupon issued to the plaintiff, the Dunkley Company, as the assignee of Samuel J. Dunkley.

In the present suits in the District Court of the Northern District of California, Southern Division, it was alleged that the defendants had made and were using infringing machines. Defendants' answers raised the issues of prior invention and use. Upon the trial it was contended by the defendants that the evidence was in some respects substantially different from that presented to the Court of Appeals of the District of Columbia, but Judge Van Fleet, before whom the cases were tried in the District Court, was unable to find that there was any such essential difference as to war-

rant the court in holding other than the conclusion reached by the District of Columbia court. The court accordingly held that plaintiff's patent was valid and that the defendants were infringers, and thereupon the court awarded an interlocutory decree in each case. These decrees were entered December 8, 1916, and are still pending. From these decrees in favor of plaintiff the defendants appealed to this court. The appeals were heard and the evidence reviewed. Central Cal. Canneries Co. v. Dunkley Co., 247 Fed. 790. The decrees of the District Court were affirmed. A petition for rehearing was denied. A petition to the Supreme Court of the United States for certiorari was denied December 17, 1917. 245 U. S. 668.

On May 1, 1918, defendants filed a motion in this court for certain orders to the District Court, and among others, an order to vacate the above mentioned decrees; also an order to reopen the cases for further testimony and proof on behalf of the defendants. The motion was denied May 20, 1918. The order provided that the mandates of this court "are hereby directed to issue without prejudice to the right of the plaintiff-appellee herein to apply to the District Court for leave to make the Dunkley Company or such other corporation or persons as plaintiff-appellee may contend is or are proper or necessary parties plaintiff to the action". The mandates in accordance with the order of this court were issued May 20, 1918.

Thereafter, on October 14, 1918, the defendants moved the District Court to request this court to withdraw its mandates of affirmance and authorize the District

Court to set aside its decrees and all other proceedings had therein and to re-open the trial and hearing of each of said causes and permit the defendants to reform and amend their pleadings for the purpose of receiving certain alleged newly discovered evidence bearing on the validity of the plaintiff's patent and its infringement by the several defendants, and upon such hearing to enter new and different decrees if the evidence warranted such action. The grounds of this motion were in substance that subsequent to the entry of the decrees herein, in a suit on the same patent by the plaintiff and its assignee against another alleged infringer, Dunkley Co. v. Pasadena Canning Co., 261 Fed. 203, tried before Judge Trippet in the District Court for the Southern District of California, certain further and additional evidence was produced and heard which it was alleged could not with reasonable diligence have been earlier discovered and was for that reason not available upon the trial of these causes; that the District Court for the Southern District of California heard the case before it and held the patent void and dismissed the bill. This last decision, it is contended by the defendants, resulted in a conflict of decision as to the validity of the patent, and it was said it would work confusion and result in hardship to the defendants. It was claimed that the newly discovered evidence was of a character which would render it probable that on another hearing the patent would be held void by the District Court. There was a further and distinct ground that at the date of the hearing in the District Court the plaintiff had

parted with all its interest in the subject matter of the suit by assigning its title in the patent pending the hearing to another corporation, and for that reason it was claimed the decrees were void and should be set aside.

The case before Judge Trippet in the Southern District of California was appealed to this court and that decree affirmed, not upon the finding that the Dunkley patent was invalid, but upon the ground that in view of the prior art the Dunkley invention was limited to the particular means employed and as so limited, defendants' device did not infringe. Dunkley Co. v. Pasadena Canning Co., 261 Fed. 386. A petition to the Supreme Court of the United States for certiorari in this case was denied April 20, 1920, 253 U. S. 485.

The case of Dunkley Co. v. California Packing Corporation before Judge Augustus N. Hand in the District Court for the Southern District of New York, 277 Fed. 989, affirmed by the Circuit Court of Appeals in the Second Circuit, 277 Fed. 996, was also called to the attention of Judge Van Fleet upon the motion of the defendants to request this court to withdraw its mandates of affirmance and re-open the cases in the District Court. The controlling question in the New York case involved a license given by the Dunkley Company to the California Fruit Canner's Association "for the benefit of itself and its successors" in settlement of an expensive conflict between Dunkley and the Fruit Canners' Association was the assignee of Beekhuis. This license was "free of royalties of any kind whatsoever, for the use of the said invention in connection

with its business relative to the canning or treatment of fruit, granting unto the said California Friut Canners' Association, the free right for the use of any machine or machines or invention owned or controlled by the said Dunkley Company" and covered by the patents. With respect to the question expected to grow out of the Dunkley application at issue in that case the court said:

"But the issues in this litigation differ from those in any of the preceding causes. Here, as there, anticipation and lack of invention were advanced by the defense, but in addition there is a plea of license growing out of the following uncontradicted facts."

The court thereupon states the facts of the license and its transfer and assignment by the Fruit Canners' Association to the California Packing Corporation, the defendant in that case. The court said in its opinion:

"It is urged that this result is an attack upon Dunkley's rights as assured in the case brought in the Northern District of California, because he there obtained injunctions against two canning companies which have now been acquired by this defendant. But this is a mistaken view of legal rights; the injunction referred to necessarily ran against certain corporations; it affected the corporate personalty, and a license likewise affects persons and corporations, and does not directly reach machinery and buildings. The Griffin & Skelley Company and Central California Company may well remain under injunction and be required to account; but that is no reason why an unlimited licensee

of Dunkley's may not buy the property of these two enjoined corporations and under his license use on his own property and in his own business machines properly forbidden to the former proprietors. Holding as we do that this defendant is the plaintiff's licensee, we need not go further and consider the validity and scope of Dunkley's patents. On this point we express no opinion, but affirm the decree below on the sole ground of license."

Judge Van Fleet, referring to these decisions, reached the conclusion that with the highest consideration for the learning of both judges, he was impressed with neither the character of the new evidence nor with the conclusions reached in those cases. "That there was a cloud of 'new' witnesses," says Judge Van Fleet, "it is quite true, giving indication that the country had been raked with a 'fine-toothed comb', so to speak; but there was little 'new' evidence given by them—if the term be used to express the idea of material evidence. In fact, there is none, aside from one or two items of so-called documentary proof which does not fall strictly within the characterization of the Supreme Court as being wholly insufficient in character as a basis to set aside or defeat an existing patent".

Judge Van Fleet concludes: "In view of the considerations suggested, to grant defendants' motion would, as it seems to me, do violence to a cardinal rule for the guidance of courts, that when parties have had full opportunity to be heard there should be a period to litigation. And in the practical administra-

tion of the law a party has had full opportunity to be heard when he has been afforded a fair and reasonable opportunity."

The court accordingly denied the defendants' motion to request this court to withdraw its mandates and authorize the District Court to set aside its decrees and re-open the cases for the purpose of receiving new testimony bearing upon the validity of the plaintiff's patent, and upon such rehearing to enter new and different decrees if the evidence so warranted. The court granted plaintiff's motion to add a new party plaintiff.

The defendants prosecute their appeals from this order of the District Court. The order is not a final decree, and is not appealable in any aspect and the appeal must therefore be dismissed.

With respect to the motions of defendants for leave to file in the District Court original bills in the nature of bills of review, it will only be necessary to refer to the proceedings in these cases just stated on defendants' appeal with these further observations by way of recital.

There is no apparent conflict between the decrees of the District Court for the Northern District of California, affirmed by this court on appeal October 1, 1917, holding the Dunkley patent No. 1,104,175 valid and infringed, Central California Canneries Co. v. Dunkley Co., 247 Fed. 790, and the decree of Judge Trippet in the Southern District of California as affirmed in this court in the same case on appeal, 261 Fed. 386. In

that case the suit was on the Dunkley machine patent No. 1,104,175, and also on the Dunkley process patent, No. 1,237,623. It is true Judge Trippet held the Dunkley machine patent, No. 1,104,175, void for anticipation and also not infringed, and the Dunkley process patent, No. 1,237,623, void for lack of invention in view of the prior art. But this court did not affirm Judge Trippet's decision on such grounds. It held that the Dunkley patents were limited to the particular means employed for removing the skin of fruit after treatment, and as so limited, the patents were not infringed by the defendants in that case.

Nor is there any apparent conflict between the decree of this court holding the Dunkley machine patent valid, and the decision of Judge Augustus N. Hand in the Southern District of New York in Dunkley Co. v. California Packing Corporation, 277 Fed. 989, as affirmed by the Circuit Court of Appeals in the second circuit in the same case. 277 Fed. 996. In that case the suit in the Southern District of California was on both the Dunkley patents but involved also the question of a license granted by the Dunkley Company. It is true that Judge Hand in that case followed Judge Trippet in holding that patent No. 1,104,175 was void for anticipation and lack of invention and that patent No. 1,237,623 was for the function of the Dunkley machine and therefore invalid, but the Circuit Court of Appeals in the Second Circuit affirmed the decision of Judge Hand, not on the ground that the Dunkley patents were invalid, but on the ground that the defendant had succeeded to a license granted to it by defendant's pre-

decessor in interest. The decree was expressly affirmed on that sole ground and on no other.

There are numerous cases in the books dealing with the right to file a Bill of Review in proceedings in equity based on Lord Bacon's famous ordinance. In this case the right to such relief lacks one essential element. It is not sought after a final decree.

In the recent case of Simmons v. Grier Bros., decided by the Supreme Court February 27, 1922, we think that court declared the equitable rule applicable in this case. In that case the plaintiffs, Frederick E. Baldwin with the John Simmons Company, brought a suit against the defendants upon a reissue patent for infringement in acetylene gas lamps and also for unfair competition. The District Court held claim 4 of the patent valid and infringed, and granted a permanent injunction, July 24, 1914, as to infringement and unfair competition, with an interlocutory decree for an accounting. Upon appeal to the Circuit Court of Appeals for the Third Circuit, the decree was affirmed as to unfair competition, but reversed as to validity of the claim of the patent involved, the appellate court holding that the claim was void. In a suit in the Southern District of New York upon the same patent by the same plaintiffs (John Simmons Company intervening), against Abercrombie & Fitch Company, it was held in direct opposition to the Pennsylvania court that the patent was valid and infringed. This decision was affirmed by the Circuit Court of Appeals for the Second Circuit and by the Supreme Court upon certiorari.

After this, plaintiffs petitioned the District Court of the Western District of Pennsylvania for leave to file what was called a "bill of review" against the decree entered January 5, 1916, upon the mandate in the Circuit Court of Appeals. The proceedings in the Pennsylvania court with respect to the right of the plaintiff to file a bill of review were finally taken to the Supreme Court upon a writ of certiorari and upon that writ the court rendered its decision February 27, 1922. The Supreme Court held that the decree of the District Court for the Western District of Pennsylvania (July 24, 1914), although following a final hearing, was not a final decree but was an interlocutory decree. Upon this state of the record the Supreme Court said: "But a bill of review is called for only after a final decree—one that finally adjudicates upon the entire merits, leaving nothing further to be done except the execution of it. If it be only interlocutory, the court at any time before final decree may modify or rescind it. Story Eq. Pl., Secs. 408a, 421, 425."

The court says further: "Regarding, therefore, the decree of January 5, 1916, as an interlocutory, not a final one, there is neither technical nor substantial ground for applying to it the rules pertaining to a bill of review and the bill herein called such is to be treated as essentially a petition for rehearing. By the 69th Equity Rule (226 U. S. 669) such a petition is in order at the term of the entry of the final decree; and, of course, if an interlocutory decree be involved, a rehearing may be sought at any time before final

decree, provided due diligence be employed and a revision be otherwise consonant with equity."

The petition for leave to file in the District Court original bills in the nature of bills of review will therefore be denied.

Regarding the defendant's petition for review as in effect an application for leave to the lower court to entertain a petition for a rehearing (Simmons Co. v. B. S. Grier Bros. Co., supra), we are of the opinion that the defendants should be authorized to file in the lower court an appropriate petition for a rehearing and that court should be authorized to entertain and make disposition of the same, according to equity upon considerations addressed to the materiality of the new matter and diligence in its presentation without restraint by reason of any proceedings heretofore had or orders made in this court, and it is so ordered.

DIETRICH, District Judge, concurs in result.

(Endorsed): Opinion filed Jun. 19, 1922.

F. D. Monckton, Clerk,
By Paul P. O'Brien,
Deputy Clerk.

HUNT, Circuit Judge, concurring:

I concur in the result announced in the opinion by Judge Morrow.

While I believe the appellate court in the exercise of a discretion has the power to decide that the bill, which is in the nature of a bill of review or motion

for rehearing upon the ground of newly discovered evidence, may be filed, yet it is proper practice for such court to go no further than to hold that a sufficient showing is made to warrant the appellate court in granting to petitioner permission to apply to the District Court for leave to file the bill or motion. Watson v. Stevenson, 53 Fed. 31; Board of Councilmen v. Bank, 120 Fed. 165; In re Gamewell Fire Alarm Co., 73 Fed. 908.

The fact that, as affects the present matter, the District Judge has expressed an opinion upon the merits of the showing made by petitioner would seem to appeal to this court for a final determination of the question of the right to file the bill. But, on the other hand, as the opinion of the District Court was permaturely formed, it may be well assumed that when the matter is properly brought before that court it will have that same consideration that it would be entitled to as though initially presented.

(Endorsed): Concurring Opinion, filed June 19, 1922.
F. D. Monckton, Clerk,
By Paul P. O'Brien,
Deputy Clerk.

No. 3825

United States
Circuit Court of Appeals
For the Ninth Circuit.

LOUIS STRADA,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

FILED
JAN 9 - 1922
F. D. MONCKTON,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Plaintiff in Error:

A. L. WISSBURG, Esq.,
JAS. E. O'KEEFE, Esq., and
C. H. VAN WINKLE, Esq., 411-14 Southern Title Building, San Diego, California.

For Defendant in Error:

JOE BURKE, Esq., United States Attorney for Southern District of California;
HERBERT N. ELLIS, Esq., Assistant United States Attorney, Federal Building, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

No. 3287 Crim.

The United States of America,)
)
Plaintiff,)
)
vs.) CITATION
)
LOUIS STRADA,)
)
Defendant.)

United States of America,)
Sou. District of California) SS
Southern Division.)

TO THE UNITED STATES OF AMERICA:
GREETINGS:

YOU ARE HEREBY CITED AND ADMONISHED TO BE AND APPEAR, at a United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to Writ of Error filed in the Clerk's Office of the District Court of the United States for the Southern District of California, Southern Division, in that certain case numbered 3287 Criminal, in said District Court, wherein Louis Strada, is plaintiff in Error, and you are defendant in error, to show cause, if any there be, why the judgment given, made and

entered against Louis Strada, plaintiff in error in said Writ of Error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS THE HONORABLE BENJAMIN F. BLEDSOE, United States District Judge, for the Southern District of California, Southern Division, this 9th day of November, 1921.

Bledsoe
United States District Judge

(ENDORSED) No. 3287 Crim. In the District Court of the United States for the Southern District of California Southern Division The United States of America, Plaintiff, vs. Louis Strada, Defendant. CITATION C. E. Burch and A. L. Wissburg, Attorneys for Defendant. Filed Nov 9 1921 *Chas. N. Williams, Clerk* Douglas Van Dyke *Deputy.*

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

No. 3287 Crim.

The United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	WRIT OF
	)	ERROR.
LOUIS STRADA,	)	
	)	
Defendant.	)	
	)	

THE UNITED STATES OF AMERICA,)
)SS
SOUTHERN DISTRICT OF CALIFORNIA)

THE PRESIDENT OF THE UNITED STATES,
To The Honorable Judge of the District Court of the United States, for the Southern District of California, Southern Division:

GREETINGS:

Because in the records and proceedings, as also in the rendition of the judgment of a cause which is in the said District Court before you, between Louis Strada, plaintiff in error, and United States of America, Defendant in error, a manifest error has happened to the great damage to the said defendant, Louis Strada, plaintiff in error, as by his complaint appears, we being willing that error, if any, should

be duly corrected, and full, speedy justice done to the parties aforesaid, in this behalf, do commend, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same to the United States Circuit Court of Appeals, for the Ninth Circuit Court, together with this Writ, so that you have the same at San Francisco, in the State of California, within thirty (30) days from the date hereof, in the said Circuit Court of Appeals to be t hen and there held, that records and proceedings aforesaid being inspected, the said circuit court of Appeals may cause further to be done therein to correct the errors, what of right, and according to the laws and customs of the United States should be done.

WITNESS THE HONORABLE CHIEF JUSTICE, William Howard Taft, Chief Justice of the United States, this 4th day of November, 1921.

(Seal) Chas. N. Williams

Clerk of the District Court of the United States, in and for the Southern District of California, Southern Division.

By _____

Deputy Clerk.

THE ABOVE AND FOREGOING WRIT OF ERROR IS HEREBY ALLOWED.

Bledsoe

United States District Judge.

The within copy of Writ of Erros is hereby, on the 1st day of November, 1921, lodged in the Clerk's Office

of the Said United States District Court, for the Southern District of California, Southern Division, for said defendant in error.

Clerk of the District Court of the United States in and for the Southern District of California, Southern Division.

By ———————————

Deputy Clerk.

(ENDORSED): No. 3287 Crim. IN THE DISTRICT COURT OF THE UNITED STATES for the SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION. THE UNITED STATES OF AMERICA, Plaintiff, vs. LOUIS STRADA, Defendant. WRIT OF ERROR FILED Nov 5 1921 *Chas. N. Williams, Clerk* Wm U. Handy *Deputy* C. E. Burch and A. L. Wissburg, Attorneys for the Defendant. Recd copy of within this 10th day of November 1921 Mark L Herron Asst. U. S. Atty.

Form No. 689.

In the DISTRICT Court of the United States,
For the Southern District of California
Southern Division

THE UNITED STATES
vs.
Louis Strada

INFORMATION.
VIOLATING SECTIONs 3 and 21, Title II National Prohibition Act of October 28, 1919.

UNITED STATES OF AMERICA,
Southern District of California } ss:

Be it Remembered, That Robert O'Connor, the Attorney of the United States for the Southern District of California who prosecutes in behalf and with the authority of the United States, comes here in person into Court at this September Term thereof, and for the United States gives the Court to understand and be informed that one LOUIS STRADA, whose full and true name, other than as herein stated, is to the affiant unknown, late of the Southern Division, of the Southern District of California, heretofore, to-wit: on or about the 8th day of November, 1920, in the City of San Diego, County of San Diego, division, district and state aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did

knowingly, wilfully and unlawfully sell to one Hugh Rochefort certain intoxicating liquor fit for beverage purposes, to-wit: one-half pint of whiskey containing alcohol in excess of one-half of one per cent by volume, at and for the sum of Four ($4.00) Dollars, lawful money of the United States; in violation of Section 3, Title II of the National Prohibition Act of October 28, 1919.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

SECOND COUNT.

And the said Robert O'Connor, Attorney for the United States as aforesaid, does further give the Court to understand and be informed:

That LOUIS STRADA, whose full and true name, other than as herein stated, is to the affiant unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 8th day of October, 1920 to and including the 8th day of November, 1920, at San Diego, San Diego County, within the State, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully and unlawfully maintain a common nuisance, to-wit: a room, building and place, to-wit: Flora D'Italia Restaurant, at 5th & "I" Streets in said city, where intoxicating liquor, to-wit: wine and whiskey, containing alcohol in excess of one-half of one per cent by volume, were

sold, kept, bartered and given away; in violation of section 21 Title II of the National Prohibition Act of October 28, 1919.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Whereupon, the said United States Attorney for the District aforesaid prays the consideration of this Court here in the premises, and that due process of law may be awarded against the said LOUIS STRADA defendant, in this behalf to make him answer to the United States touching and concerning the premises.

Dated at San Diego, this 26th day of Sept., A. D. 1921.

Robert O'Connor
United States Attorney for the Southern District of California
Herbert N. Ellis
Assistant United States Attorney

UNITED STATES OF AMERICA,
ss:
Southern District of California

I, GEORGE SEARS, Police Officer for the City of San Diego, being sworn, do say that the foregoing information is true as I verily believe.

George Sears

Subscribed and sworn to before me this 26th day of Sept., A. D. 1921

Chas. N. Williams
Clerk U. S. Dist. Court. (Seal)

(ENDORSED): *No.* 3287 Crim. U. S. District COURT Southern *District of* California Southern Division THE UNITED STATES *vs.* LOUIS STRATA INFORMATION *For* Viol: Secs. 3 & 21, Title II of the National Prohibition Act of October 28, 1919. Filed Sep. 27 1921 *Chas. N. Williams, Clerk.* Louis J. Somers *Deputy*

At a stated term, to-wit, the SEPTEMBER TERM, A. D., 1921, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of SAN DIEGO on Tuesday the 27th day of September in the year of our Lord, one thousand nine hundred and twenty one.

Present:

The Honorable Oscar A. Trippet, District Judge.

United States of America, Plaintiff)
)
vs.) No. 3287 Crim.
) S. D.
Louis Strada, Defendant)

An Information having been presented to the court by T. F. Green, Esq., Assistant U. S. Attorney, appearing as counsel for the Government, and, pursuant to a motion made by said attorney, said Information was thereupon ordered filed.

At a stated term, to-wit: the SEPTEMBER Term, A. D., 1921, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room therein, in the city of SAN DIEGO on WEDNESDAY, the 28th day of SEPTEMBER in the year of our Lord, one thousand nine hundred and twenty one;

Present:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America, Plaintiff)
)
vs.) No. 3287 Crim.
) S. D.
LOUIS STRADA, Defendant)

This cause coming on at this time for arraignment and plea; H. N. Ellis, Esq., Assistant U. S. Attorney, appearing as counsel for the Government and defendant appearing in court with his attorney A. L. Wissberg and C. E. Burch, Esqs., and defendant having been called and arraigned and required to enter his plea, defendant thereupon enters his plea of NOT GUILTY and, good cause appearing therefor, it is by the court ordered that bail of defendant be fixed in the sum of $1000.00 and case set for trial on September 29, 1921.

At a stated term, to-wit: the SEPTEMBER TERM, A. D., 1921, of the District Court of the United

States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of SAN DIEGO on FRIDAY, the TWENTY-EIGHTH day of OCTOBER in the Year of our Lord, one thousand nine hundred and twenty-one;

Present:

The Honorable BENJAMIN F. BLEDSOE, District Judge.

United States of America, Plaintiff,)
)
vs.) No. 3287 Crim.
) S. D.
LOUIS STRADA, Defendant.)

This cause coming on at this time for trial; H. N. Ellis, Esq., Assistant U. S. Attorney, appearing as counsel for the Government and defendant being present in court with his attorneys A. L. Wissburg and C. E. Burch, Esqs. and now, good cause appearing therefor, it is by the court ordered that this cause be continued to the hour of two o'clock P. M. for trial and now, at the hour of two o'clock P. M. this cause coming on for trial and all parties interested being present as at the morning session and J. R. Christopher being also present in his official capacity as shorthand reporter of the testimony and proceedings and counsel for the respective parties having announced their readiness to proceed with the trial of this cause and the court having ordered that this cause be proceeded with and that a jury be impanelled herein; and

The following twelve names having been drawn from the jury box, to wit: Edward A. Powell; William H. Morse; Elias Lasenbury; Chas. H. Austin; Walter Stephens; Frank L. Doolittle; David F. Garrettson; Franklin E. Black; John N. Haskell; Duncan M. Hartman; Claude E. Agard and Chas. F. Atkinson; and

Said jurors having been called and sworn on voir dire; and passed for cause; and

Chas. F. Atkinson, William H. Morse and Claude E. Agard having been respectively and separately peremptorily challenged by the defendant and by the court excused; and

The three following names having been drawn from the jury box, to wit: Paul Schiefer; Emil G. Schnepp and Frederick M. Sumner and said jurors having been called and sworn on voir dire and passed for cause and said jury having been accepted and sworn in a body as the jury to try this cause and said jury as so impanelled and sworn consisting of the following named jurors, to wit:

THE JURY

1. Edward A. Powell
2. Emil G. Schnepp,
3. Elias Lazenbury,
4. Chas. H. Austin,
5. Walter Stephens,
6. Frank L. Doolittle,
7. David F. Garrettson,
8. Franklin E. Black,
9. John N. Haskell,
10. Duncan M. Hartman,
11. Paul Schiefer,
12. Frederick M. Sumner.

And said jury having received the admonition that during the progress of this cause they are not to

permit other persons to talk to them nor themselves talk to other persons about this cause, or anything connected with this cause, and that, until said cause is finally submitted to them for their consideration under the instructions of the Court they are not to talk with each other about this cause or anything therewith connected, thereupon said cause is continued to ten o'clock A. M. October 31st, 1921, for further trial.

At a stated term, to-wit: the SEPTEMBER TERM, A. D., 1921, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of SAN DIEGO on MONDAY, the THIRTY-FIRST day of OCTOBER in the Year of our Lord, one thousand nine hundred and twenty-one;

Present:

The Honorable BENJAMIN F. BLEDSOE, District Judge.

United States of America, Plaintiff,)
)
vs.) No. 3287 Crim.
) S. D.
LOUIS STRADA, Defendant.)

This cause coming on at this time for further trial; H. N. Ellis, Esq., Assistant U. S. Attorney, appearing as counsel for the Government and defendant Louis Strada being present in court on bail with his attor-

neys C. E. Burch and A. L. Wissburg, Esqs. and J. R. Christopher being also present in his capacity as official shorthand reporter of the proceedings and trial; and counsel for the respective parties having announced their readiness to proceed with the trial of this cause and the court having ordered that this cause be proceeded with; and

V. M. Mossholder, a witness herein, having been called, sworn, and having testified on behalf of the Government; and

J. J. Finnigan and Hugh Rochefort having separately and respectively been called and sworn and having respectively and separately testified on behalf of the Government; and

Now, upon motion of said H. N. Ellis, Esq., there were offered and admitted in evidence the following exhibits, to wit:

U. S. Ex. No. 1—Small china cup

U. S. Ex. No. 2—Small china cup

U. S. Ex. No. 3 for Identification—1/2 pint bottle of whiskey.

And James C. Byers and George M. Sears, witnesses herein, having been separately and respectively called and sworn and having separately and respectively testified on behalf of the Government; and

Now, upon motion of said H. N. Ellis, Esq. there were admitted in evidence the following exhibits, to wit:

U. S. Ex. No. 3—1/2 pint bottle of whiskey previously marked for Identification.

U. S. Ex. No. 4—Small drinking glass,

U. S. Ex. No. 5—Small drinking glass,

U. S. Ex. No. 6—Quart mason jar containing small quantity of liquor

And thereupon the Jury having received the admonition that during the progress of this cause they are not to permit other persons to talk to them nor themselves talk to other persons about this cause or anything connected with this cause, and that, until said cause is finally given to them for consideration under the instructions of the court, they are not to talk with each other about this cause, or anything connected therewith; the said court declared a recess to the hour of two o'clock P. M. for further trial; and

Now, at the hour of two o'clock P. M. the court having reconvened and all parties interested in this cause being present as at the morning session and counsel having announced their readiness to proceed with the trial of this cause and the court having ordered that this cause be proceeded with and

H. N. Ellis, Esq., Assistant U. S. Attorney, appearing on behalf of the Government, having made a motion for attachment for witness H. H. Kinny, and said motion having been denied by the court; and

R. W. Chadwick, having been called, sworn and having testified on behalf of the Government and now,

At the hour of 2:41 o'clock P. M. the Government rests; and

Herbert N. Ellis, Esq., having been called, sworn and having testified on behalf of the Defendant and

Louis C. Strada, having been called, sworn and having testified on behalf of the Defendant; and

Mrs. Cathrine Strada having been called, sworn and having testified on behalf of the defendant; and

Thereupon the Defendant rests and the testimony closes; and

Said H. N. Ellis, Esq. having argued to the jury on behalf of the Government and A. L. Wissburg, Esq. having argued to the court on behalf of the Defendant and said H. N. Ellis, Esq. having argued in rebuttal; the

Court thereupon instructs the jury with respect to the law involved in this cause and———Kilty having been duly sworn to take charge of said jury during the deliberations of its verdict and the jury having retired to deliberate upon its verdict; and

Now, at the hour of six o'clock P. M. all being present as before and the said jury having returned into the court room and the court having stated that the jury is present and upon being asked if it has agreed upon a verdict and said jury having replied that it was unable to agree on the first count but had reached a decision on the second count, and upon being requested to present its verdict on the second count and said verdict as so presented and read by the clerk being as follows, to-wit:

"UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION United States of Amer-

ica, Plaintiff vs. Louis Strada, Defendant. No. 3287 Crim. We, the Jury in the above entitled cause, find the defendant, Louis Strada———— as charged in the first count of the Information and GUILTY as charged in the second count of the Information. San Diego, California, October 31, 1921, John N. Haskell, Foreman.

And the court having discharged said jury with thanks and the court having allowed said defendant to go on bond heretofore given, said cause is continued to the hour of 9:30 o'clock A. M. November 1st, 1921, for sentence.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

United States of America, Plaintiff,	)	
vs.	)	No. 3287 — Crim.
Louis Strada, Defendant.	)	

We, the Jury in the above entitled cause, find the defendant, LOUIS STRADA,————————as charged in the first count of the Information; and Guilty as charged in the Second count of the Information.

San Diego, California, October 31, 1921.

John N. Haskell
Foreman

Filed Oct 31 1921 *Chas. N. Williams, Clerk* Wm. U. Handy *Deputy.*

At a stated term, to-wit: the SEPTEMBER TERM, A. D. 1921 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of SAN DIEGO on TUESDAY, the FIRST day of NOVEMBER in the Year of our Lord, one thousand nine hundred and twenty one;

Present:

The Honorable BENJ. F. BLEDSOE, District Judge.

United States of America, Plaintiff,)
)
vs.) No. 3287 Crim.
) S. D.
LOUIS STRADA, Defendant.)

This cause coming on at this time for sentence; H. N. Ellis, Esq., Assistant U. S. Attorney, appearing as counsel for the Government and defendant Louis Strada being present in court on bail with his attorneys C. E. Burch and A. L. Wissburg, Esqs. and motions having been made by A. L. Wissburg, Esq., attorney as aforesaid for (1) Arrest of Judgment (2) To set aside verdict, (3) for new trial and (4) That pronouncement of judgment be continued to November 3rd, 1924 in order that counsel might present motions as aforesaid in writing, and all of

said motions as aforesaid being denied by the court, the court now pronounces sentence upon said defendant for the offence of which he now stands convicted, namely, violation of the National Prohibition Act of October 28, 1919, and it is the judgment of the court that said defendant stand committed to the San Diego County Jail for the term and period of one year on the second count and said A. L. Wissburg, Esq. having excepted to the court's denying motions as aforesaid and to judgment and said attorney having made a motion that a stay of execution be granted defendant herein, it is by the court ordered that said motion for stay of execution be denied and that defendant be remanded to the custody of the U. S. Marshal.

41-438

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

United States of America, Plaintiff,)
)
vs.) No. 3287 Crim.
) S. D.
)
Louis Strada, Defendant)

I, CHAS. N. WILLIAMS, Clerk of the District Court of the United States, for the Southern District

of California, do hereby certify the foregoing to be a full, true and correct copy of an original Judgment entered in the above entitled cause; and I do further certify that the papers hereto annexed constitute the Judgment Roll of said cause.

ATTEST MY HAND AND SEAL OF said District Court this 12th day of November A. D. 1921.

(SEAL) CHAS. N. WILLIAMS, Clerk,
By Wm. U. Handy
Deputy Clerk.

(ENDORSED): No. 3287 Cr. In the District Court of the United States for the Southern District of California Southern Division. United States of America, vs. Louis Strada. JUDGMENT ROLL. Filed Nov. 12 1921 Chas. N. Williams *Clerk* By Wm. U. Handy *Deputy Clerk* Recorded Minute Book No. 41 Page 438

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

No. 3287 Crim.

The United States of America,	)
	)
Plaintiff,	) PETITION FOR
	) WRIT OF
vs.	) ERROR OF
	) LOUIS STRADA
LOUIS STRADA,	) IN CASE NO.3287.
Defendant.	)

Comes now your petitioner, Louis Strada, defendant in the above entitled cause and brings this, his

petition for Writ of Error to the District Court of the United States in and for the Southern District of California, Southern Division, and in that behalf says:

That on the 31st day of October, 1921, there was given, rendered in the above entitled action, a verdict against your petitioner, wherein and whereby your petitioner, the said Louis Strada, was found guilty on the Second count in the information, Numbered 3287 Crim., of the above entitled cause.

That thereafter, towit, on the 1st day of November, 1921, your petitioner was sentenced as follows: To be imprisoned in the County Jail at San Diego, for the period of twelve (12) months on the Second count.

And your petitioner says that he is advised by counsel, and avers that there was and is manifest error in the record and proceedings had in such case, and in the making, giving, rendition and entry of such judgment and sentence, to the great injury and damage of your petitioner, all of which errors will be more fully made to appear by examination of said record, and by examination of the Bill of Exceptions to be hereinafter, by your petitioner rendered and filed, and in the assignment of errors hereinafter set out; and to the end hereafter that said judgment and sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner now prays:

That the Writ*e* of Error may be issued, directed there, from the District Court of the United States for the Southern District of California, Southern Division, returnable according to law and practice of the Court, and that there may be directed to be returned, pursuant thereto, a true copy of the Record, Bill of Exceptions, Assignment of Errors, Judgment Roll, and all proceedings had and to be had in said cause; that the same may be moved into the U. S. Circuit Court of Appeals, for the Ninth Circuit, and to the end that the error, if any has happened, may be duly corrected, and full and speedy justice be done your petitioner, AND

Your petitioner now makes the Assignment of Errors attached hereto, upon which he will rely and which will be made to appear by a return of said record, in obedience to said Writ.

WHEREFORE YOUR PETITIONER PRAYS, the issuance of the Writ*e* of Error as herein prayed for, and prays that the Assignment of Errors annexed hereto may be considered as an assignment of Errors upon the Writ*e*, and that judgment rendered in this cause may be reversed and held for nought, and that said cause may be remanded for further proceedings, and that he, the said petitioner be awarded a Super*c*edeas and stay of execution upon said judgment, and all necessary processes and that he be admitted to bail.

A. L. Wissburg.
C. E. Burch
Attorneys for the Defendant.

(ENDORSED): No. 3287 Criminal. In the District Court of the United States for the Southern District of California Southern Division The United States of America, Plaintiff vs. LOUIS STRADA, Defendant PETITION FOR WRIT OF ERROR OF LOUIS STRADA, in Case No. 3287 Filed November 4 1921 Chas. N. Williams Clerk C. E. Burch & A. L. Wissburg, Attorneys for Defendant

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

No. 3287 Crim.

THE UNITED STATES OF AMERICA, Plaintiff, vs. LOUIS STRADA, Defendant.	ORDER ALLOWING WRIT OF ERROR AND SUPERCEDEAS. In Case No. 3287

Comes now Louis Strada, Petitioner and Defendant above named, and C. E. Burch and A. L. Wissburg, his attorneys, and move the Court for an order allowing the Writ of Error and Supercedeas to be granted said petitioner and defendant, Louis Strada, AND

PURSUANT TO SAID MOTION, and upon filing the petition for Writ of Error, and the Assignment of Errors, IT IS HEREBY ORDERED, and this does

hereby order and direct that a Writ of Error be and hereby is allowed, to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the verdict and judgment heretofore entered herein, AND

IT IS FURTHER ORDERED AND DIRECTED, that pending decision upon said Writ of Error, the Supercedeas prayed for by the defendant in his petition for Writ of Error, prayed for herein, is hereby allowed, and that execution of said judgment and decision is hereby stayed, and

IT IS FURTHER ORDERED AND DECREED that the defendant, Louis Strada is admitted to bail in the sum of Twenty-five Hundred &———— 00/100 Dollars.

Done in open Court, this 5th day of November, 1921.

Bledsoe

U. S. District Judge, in and for the Sou. District of California, Sou. Division.

(ENDORSED): No. 3287 Crim. IN THE DISTRICT COURT OF THE UNITED STATES for the SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION The United States of America, Plaintiff vs. LOUIS STRADA, Defendant. Order allowing Writ of Error and Supercedeas. Filed Nov 5 1921 *Chas. N. Williams, Clerk* Wm. U. Handy *Deputy* C. E. Burch and A. L. Wissburg, Attorneys for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

No. 3287 Crim.

- - - - - - - - - - - - - -

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

LOUIS STRADA, Defendant

: ASSIGNMENT OF ERRORS

- - - - - - - - - - - - - -

Comes now Louis Strada defendant above named and plaintiff in error herein, by his attorneys and in connection with his petition for Writ of Error from the above-entitled Court permitting him to procure a Writ of Errors from the said Court, directed to the United States Circuit Court of Appeals before the Ninth Circuit and from the judgment and sentence made and entered in the above entitled action against Louis Strada, above named defendant and plaintiff in error and petitioner herein, now makes and files with his said petition the following assignment of errors herein, upon which he will rely for a reversal from the rulings of the Court specified herein and the said judgment and sentence upon said Writ, and which said Errors and each and every of them are a great detriment and injury and prejudice to the said de-

fendant, Louis Strada, and in violation of the rights conferred upon him, he makes the following assignment of errors, which he alleges occurred upon the trial of said cause, and to all of which he duly excepted at the time:

FIRST

The verdict is against the evidence.

SECOND

The verdict is against the law.

THIRD

The Court erred in over-ruling the objection to a question propounded on direct examination by Mr. Ellis to J. J. Finnegan, witness for the prosecution; said question, answer and ruling being as follows:

Question: Were you employed as Deputy Sheriff in the month of October, 1920.

Answer: Yes, sir.

Q. You heard what Mr. Mossholder said?

A Yes sir.

Q. Did you come to this place?

A. I went there first I believe about September 30.

Q. What did you do on that occasion?

MR. BURCH: I object to that as incompetent, irrelevant and immaterial

THE COURT: Over-ruled.

MR. BURCH: Not covered by the pleadings, September 30th.
THE COURT: Over-ruled.
MR. BURCH: Exception.
(See transcript of record Page——)

FOURTH

The Court erred in over-ruling the objection to a question propounded on direct examination by Mr. Ellis to J. J. Finnegan, witness for the prosecution; said question, answer and ruling, being as follows:
Q. He told you he was afraid to give it to you?
A. Yes, the waitor. I asked him why he was afraid.
MR. BURCH: I object to that as incompetent, irrelevant and immaterial, and doesn't have a tendency at all to bind Strada.
THE COURT: Over-ruled.
MR. BURCH: Exception.
(See transcript of record Page——)

FIFTH

The Court erred in over-ruling the objection to a question propounded on direct examination by Mr. Ellis to George M. Sears, witness for the prosecution; said question, answer and ruling, being as follows:
Q. Is this the seal that you put on?
A. That is the seal.
Q. Do you know what is in this bottle?

A. Whiskey, alcoholic liquor, supposed to be whiskey.
MR. BURCH: I object to the latter part of it.
THE COURT: Over-ruled.
MR. BURCH: Exception: I will stipulate it is not fit for beverage purposes.

(See transcript of record Page——)

SIXTH

The Court erred in causing the jury to assume that the whiskey mentioned in this case is intended for beverage purposes as indicated by the direct examination of George M. Sears, witness for the prosecution by Mr. Ellis; said question, answer and ruling being as follows:

MR. ELLIS: Q. Did you test it?
A. No, smelt of it.
MR. ELLIS: I offer this in evidence, your Honor, at this time, as United States Exhibit——.
MR. BURCH: For what purpose?
MR. ELLIS: For the purpose of evidence in the case, of liquor that was purchased by the witness, Rocheford, as whiskey.
Q. Do you dare test that?
A. I can tell by the whiskey. I know it is whiskey. We found there a jar that had liquor in it, the same thing that we found in the place after we searched it.
MR. ELLIS: We can make a test of this. Mr. Burch doesn't seem to be able to tell whether it has

more than one-half of one percent of alcohol. Does it contain more than one-half of one per cent.
MR. BURCH: I will stipulate that it contains more than one-half of one per cent alcohol. I won't stipulate that it is good for beverage purposes.
THE COURT: The jury will be entitled to assume, it is intended for beverage purposes. We will not indulge in refinements here that will make fools of us.
MR. BURCH: Exception to the ruling of the Court.
(See Transcript of record Page——)

SEVENTH

The Court erred in over-ruling the objection to a question propounded on direct examination by Mr. Ellis, George M. Sears, witness for the prosecution; said question, answer and ruling being as follows:
Q. How frequently have you seen, if at all, the defendant Strada about this place? How much time did you spend there on an average at his place
MR. WISSBURG: We object to that as immaterial.
THE COURT: Over-ruled.
MR. WISSBURG: Exception.
(See Transcript of Record Page——)

EIGHTH

The Court erred in sustaining the objection to a question propounded on direct examination by Mr. Wissburg to Louis Strada, defendant, said question, answer and ruling being as follows:

Q. Mr. Strada, along about the 7th day of October and on or about the 13th day of September, did you get a barrel of grape juice from the California Importing Company.

MR. ELLIS: I object to that as immaterial.

THE COURT: Sustained as immaterial; he is not charged with having grape juice.

MR. WISSBURG: Exception.

(See transcript of record, Page——)

NINTH

The Court erred in sustaining the objection of the District Attorney to a question propounded on direct examination by Mr. Wissburg to Louis Strada, defendant; said question, answer and ruling being as follows:

Q. How did you buy the grape juice?

MR. ELLIS: I object to that as immaterial.

THE COURT: Sustained.

MR. WISSBURG: Exception.

(See transcript of record, Page——)

TENTH

The Court erred in over-ruling the objection to a question propounded on cross-examination by Mr. Ellis to Louis Strada, defendant; said question, answer and ruling being as follows:

Q. You don't know whether you told this fellow to violate the law, or not either, did you?

MR. WISSBURG: I object to that as immaterial.
THE COURT: Over-ruled.
MR. WISSBURG: Exception.
A. I ain't got anything there, it is not up to me to tell him.
(see transcript of record, page——)

ELEVENTH

The Court erred in refusing to grant defendants motions orally made first, to arrest judgment, second, motion to strike the verdict as inconsistent, and not in accordance with the law or the evidence, and third, in over-ruling defendant's motion for a new trial, to all of which the defendant excepted.
(see transcript of record, Page——)

TWELFTH

The Court erred in rendering judgment against and in sentencing the defendant.

All of which the defendant objected to, and took exceptions from as will more fully appear from the Bill of Exceptions to be hereafter filed in this case.

Wherefore defendant, Louis Strada, by his attorneys, prays that the judgment of the District Court of the United States within and for the Southern District of California, for and on account of each one of the errors, assigned as aforesaid, and other manifest errors in the record in said cause in the United States of America, versus Louis Strada, in

said District Court be reversed and allowed; and that such further orders be made therein as may be just and proper in the premises and that said defendant be restored to all things which he may have lost by reason of said judgment of said District Court.

A. L. Wissburg
C. E. Burch
Attorneys for defendant.

(ENDORSED): No. 3287 Crim. IN THE DISTRICT COURT OF THE UNITED STATES for the SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION The United States of Amer*cia,* Plaintiff, vs. LOUIS STRADA, Defendant Assignment of Error Filed November 4 1921 Chas. N. Williams, Clerk C. E. Burch & A. L. Wissburg, Attorneys for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

THE UNITED STATES OF AMERICA, Plaintiff,	
-vs-	No. 3287 Criminal. BILL OF EXCEPTIONS.
LOUIS STRADA Defendant,	

BE IT REMEMBERED, that on the 31st day of October, 1921, Herbert N. Ellis, Esquire, Assistant

(Testimony of V. M. Mossholder.)

United States Attorney, appearing for plaintiff; and A. L. Wissburg, Esquire and Charles E. Burch, Esquire, appearing for defendant, and defendant appearing in person, the following proceedings were had:

THE COURT: United States versus Louis Strada.

- o O o -

V. M. MOSSHOLDER,

a witness called on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. ELLIS:

I am a deputy sheriff. I do not know the defendant personally. I have seen him. I saw him at the Strada restaurant, known as the Flor de Italia, located at 5th and I. Street, San Diego, California when I visited the restaurant October 3 of last year. Mr. Finnegan and I went in. I bought some sandwiches and Mr. Finnegan bought some wine. The wine was bought by the drink. Mr. Finnegan paid Fifty ($.50) Cents for it. I did not have any conversation with the defendant. The defendant came in while we were eating our lunch. He came in the side door and went around; there is a sort of arch-way in the middle and a row of tables; he came in the side door and came around into the kitchen. A man picked up the money and walked away. I do not know what he did with it. I didn't see him check it up in the cash register.

(Testimony of V. M. Mossholder.)

CROSS EXAMINATION

BY MR. WISSBURG:

A man named Joe took the money and walked off. I never saw him before that week. I didn't get the drink from Mr. Strada. I didn't order it from him. I do not know whether the things served me was Joe's property or the property of Mr. Strada. It was served in that house. I never paid for it, Mr. Finnegan did. I went in this place for the purpose of securing evidence if I could. I drank it up there. I testified in this matter before the Commissioner. I couldn't say by the taste whether the wine contained more than one half of one per cent alcohol or not. I could not state that now, not without testing it to the best of my ability. I have no way of testing the wine now. I have tasted wine before. This tasted like ordinary wine. I have tasted grape juice frequently. I imagine this was grape juice in fermented form, I mean that it contained alcohol, while I don't think that grape juice when crushed out of grapes contains much alcohol, practically none, I would say. I would say that the material or liquid that I drank that time contained more than one half of one per cent alcohol. That is the reason upon which I base my answer. I stated before the Commissioner that if I wasn't mistaken that it contained more than one half of one per cent alcohol, I thought it did. My recollection of the alcoholic contents was better when I testified before the

(Testimony of V. M. Mossholder.)

commissioner than it is today. I could not swear under oath that the alcoholic contents of this wine was more than one-half of one per cent.

RE-DIRECT EXAMINATION

BY MR. ELLIS:

I do not know what connection the man had with the place, who served me the drinks. He was simply waiting on the table at that time. I don't know whether he was a partner or what he was, what he had to do with it. When I saw Mr. Strada there he did not serve the guests. Mr. Strada did not serve me. The man who served me was serving other guests.

RE-CROSS EXAMINATION

BY MR. WISSBURG:

Mr. Strada ran the cafe and restaurant there. He served meals.

BY THE COURT:

When you went in there what did you ask for? A. When we went in there we asked for wine and that is what the waiter brought us in response to our request. He served it in teacups and it tasted like wine.

BY MR. WISSBURG:

I did not state we asked for Dago red. We did not state any particular kind of wine. We did not know he was bringing us Dago red. He said "All right" and brought in what I called Dago red; that is

(Testimony of V. M. Mossholder.)

what I call the name of the wine he brought in although we did not state any particular kind of wine, we simply asked for wine. I have drank various wines. Dago red is wine that contains more than one half of one per cent alcohol. I didn't say he was bringing wine when we called for wine. I asked for wine and that is what he brought me. Dago red looks like red grape juice.

~~THE COURT:~~

~~So is ink red, a certain kind of ink.~~

B. F. B.

- o O o -

J. J. FINNEGAN

a witness called on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ELLIS:

I was a deputy sheriff in October, 1920. I went to this place, this restaurant, about September 30. I heard what the witness, Mr. Mossholder, said.

Q. What did you do on that occasion?

MR. BURCH: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. BURCH: Not covered by the pleadings September 30.

THE COURT: Overruled.

MR. BURCH: Exception.

(Testimony of J. J. Finnegan.)

I first went to the front of the Cafe and spoke to Mr. Strada. He told me to go to the back room which I did. I asked Mr. Strada if he could fix me up for a little drink. He asked me who I was. I told him I had been there several times before. He told me to sit down and asked me what kind of drink I wanted. I first told him I wanted whiskey. He said he was all out of that but had a little wine. I asked him how much it was and he said he usually charged seventy-five cents but would give it to me for fifty cents. I said all right to give it to me, which he did. I was then in the rear of the room on the right hand side of the restaurant which is located on Fifth and I Street on the Northwest corner, when he served that to me. I am talking about the defendant Mr. Strada. I went there the following night. I ordered a drink from a big fat fellow. Strada was in the front part of the restaurant. I got wine. The waiter told me that he was afraid to give it to me.

MR. BURCH: I object to that as incompetent, irrelevant and immaterial. It does not have a tendency at all to bind Strada.

THE COURT: Overruled.

MR. BURCH: Exception.

I asked him why he was afraid. He told me that I didn't look good to him. I waited at the table and he served me with wine. I know what wine is. I paid fifty cents a cup. It was served in a little tea cup. I had about 8 or 9 cups of the wine.

(Testimony of J. J. Finnegan.)

Q. Did you feel any effects of it?

A. I think I did, you bet. The effect it had on me was that I was about half intoxicated when I left the restaurant. I did not notice Strada when I went out. The last recollection I had he was there. I went there again on October 3rd with Mr. Mossholder. Mr. Mossholder and I went in the side entrance. We ordered wine. We got one drink of wine at that time. I paid fifty cents a cup; there were two cups. I don't remember seeing Strada there that time. The first time that I went in that restaurant I saw this other man in there. Strada didn't serve me; he told me to go to the rear of the store the first time where the big fellow served me. Strada has never sold me wine. Strada sent me back to the rear to get what I wanted. The man who served me the first evening was the man who served Mr. Mossholder and me the last time. When the waiter came in I told him I was speaking to the Boss and I wanted a drink. He wanted to know what boss I had been speaking to and I told him the boss up in front. Before serving me he went to the front of the building where the defendant was. I did not see him with the defendant. I was in a booth in the rear. He then came back and served me.

CROSS-EXAMINATION

BY MR. WISSBURG:

I was working from the sheriff's office when I went to that restaurant with Mr. Mossholder for the pur-

(Testimony of J. J. Finnegan.)

pose of getting evidence if I could. Mr. Strada did not serve me at any time that evening and I did not hear him tell the waiter anything about serving me. The waiter served me and took my money. I do not know what he did with the money. I did not see him put it in the till. He picked it up and carried it in his hand as far as I could see. I do not know whether he gave it to Mr. Strada or not.

The second evening I was there I had 8 or 9 cups. I went there for the purpose of securing evidence. I did not get a bottle because I did not ask for it. I did not have any drinks there before I went there the second time. Mr. Strada did not wait on me at all when I got the 8 or 9 cups. I call that which was served me Dago red. I do not know the different kinds of Dago red, as to the quantity of alcoholic contents.

I am an automobile salesman and have been for about seven years. I had been engaged in working with the sheriff in getting evidence about drinks for seven months at the time I went to Mr. Strada's. I did not take any of the drinks out of the cups. I drank every bit of it. I can not state what per cent of alcohol that contained. I have no idea what per cent it contained.

RE-DIRECT EXAMINATION

BY MR. ELLIS:

The drink that I got when I went with Mr. Mossholder was the same kind of wine I had purchased

(Testimony of J. J. Finnegan.)

at the time when I drank 8 or 9 cups of it. It was the same stuff. I did not feel any effect of this one cup. By the taste of it I think it was the same stuff.

RE-CROSS EXAMINATION

BY MR. WISSBURG:

I did not get any whiskey there. I did not speak to Mr. Strada about whiskey. Mr. Strada was in the front all the time that I was in the rear. I was never served any whiskey.

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HUGH ROCHEFORD.

a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

I am a police officer of the city of San Diego, and was on October 8, 1920, and I know the defendant, Mr. Strada and know where his place of business is. I went to his place of business on the corner of Fifth and I. Streets on the North side of I. Street. I think it was about the 8th of November, yes, November 8th and it was about 8 o'clock at night. I had a party with me and we went to the back and called for a drink. The party with me was woman, I do not know who she was. She asked the waiter, whose name is Bornacorsi, for two drinks, and he brought it. I know what whiskey is. The waiter served us with two drinks of whiskey in little white earthen mugs, for which I paid fifty cents a piece, or $1.00 for the two drinks. United States Exhibits 1 and 2 are the little

(Testimony of Hugh Rocheford.)

white earthen mugs in which these drinks were served to us. They were about half full.

I got a bottle from the restaurant. The waiter sold it to me. I paid him $4.00 for this half-pint of whiskey. He first said he didn't want to give me any bottle to take out, but the woman told him it would be all right. She said she knew me. He brought me that bottle wrapped in paper. The price was $4.00 and I handed him the money. I do not know what he did with the money. I do not know whether he put it in his pocket or the cash register or what he did with it. I know that whiskey was in the bottle. I handed it to Sears and Chadwick after I walked out into the street. I had no dealings with Strada, but only with the waiter. United States Exhibit 3 for Identification was shown to the Court.

I know what is in that bottle, it is whiskey. I did not see Strada at his place of business that night. I did not feel the effects of the liquor I drank that night. I knew what it was. It was whiskey. I had one drink and the woman with me had two drinks.

CROSS EXAMINATION

BY MR. BURCH:

I know it contained one half of one per cent alcohol. I had drank whiskey for about eight years occasionally and this was whiskey. I went there with this woman for the purpose of getting evidence. I told Sears and Chadwick to follow me. I never saw the

(Testimony of Hugh Rocheford.)

defendant Strada until the time he was in the Commissioner's office. The liquor that was served us looked just about the same as this liquor in this bottle. This in the bottle is whiskey. I wouldn't want to drink this liquor. It might be fit for beverage purposes for some people, but it wouldn't be for me. I don't know whether Strada got the money or not. I don't know where he got the liquor from. He came through the entrance that leads into the center of the restaurant when he brought the liquor.

RE-DIRECT EXAMINATION

BY MR. ELLIS:

We ordered the drinks and after about long enough to pour them into cups and walk back, he served them. When he got the bottle he was gone about five minutes.

It was then stipulated by respective counsel that Strada, the defendant in this case, was the proprietor of the restaurant situated on the northwest corner of Fifth and I. Streets, at the time Rocheford purchased liquor, about the 8th of November, 1920.

- o O o -

DIRECT EXAMINATION

Mr. James C. Byers was then called as a witness on behalf of the plaintiff whereupon during which examination witness was asked if he had any information abut the Flor de Italia restaurant selling liquor there before he sent his men there, to which counsel for the defendant, Wissburg, offered objection on the

(Testimony of James C. Byers.)

ground that the question was incompetent, irrelevant and immaterial.

COURT: Are you going to claim there was any trapping of this defendant?

MR. WISSBURG: No, sir, we do not claim that.

THE COURT: All right. Sustained.

Whereupon the witness Byers was withdrawn.

GEORGE M. SEARS

a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ELLIS:

I am and was a police officer of the City of San Diego during October and November 1920.

Witness was then shown United Exhibit 3 for Identification and stated, referring to said exhibit:

This Exhibit #3 I first saw on November 8th about 9 P. M. Officer Chadwick and I at that time got this bottle from Officer Rocheford, as he came out of the Flor de Italia Restaurant. I sealed it and kept it in my possession until it was turned over to the United States Commissioners' Court. That seal now on the bottle is the seal that I put there.

Witness was then asked if he knew what was in this bottle, to which he answered:

There is whiskey in the bottle, alcoholic liquor supposed to be whiskey.

(Testimony of George M. Sears.)

MR. BURCH: I object to the latter part of it.

THE COURT: Denied. Overruled.

MR. BURCH: Exception. I will stipulate it is not fit for beverage purposes.

We searched Officer Rocheford before he went into the place, took him there in a machine, let him out and watched him meet this woman, and followed him down the street to the restaurant and watched the restaurant, and when he came out we went up to him and secured this bottle from him. I know that he didn't have this bottle in his pocket when he went into the restaurant and that he did have it when he came out. We found there a jar that had liquor in it, the same thing that we found in the place after we searched it.

It was stipulated that on the behalf of the defendant that the liquor contained in United States Exhibit #6 contained more than one half of one per cent alcohol, but there was no stipulation that it was good for beverage purposes.

THE COURT: The jury will be entitled to assume that it was intended for beverage purposes. We will not indulge in refinement that will make fools of us.

MR. BURCH: Exception to the ruling of the Court.

United States Exhibit #3 for Identification was then offered and received in evidence as plaintiff's exhibit 3. Officer Chadwick and I went through the kitchen after securing the bottle from Officer Rocheford. When we entered the kitchen, there was a

(Testimony of George M. Sears.)

waiter throwing two glasses full of alcoholic liquor into soup. It was of that stuff, and those are the two glasses he dumped it out of.

The two glasses were then introduced as United States Exhibits 4 and 5 and received as evidence.

The cook was Bonacourci. The jar was sitting on the table in the kitchen, and the two glasses were sitting on a table back of a partitition in the main dining room. This other is some sort of a concoction. I wouldn't testify that it is alcohol. The jars were clean at the time, but after I took it into my possession it worked up and run over. I made no test of it. I had a conversation with Strada about a week after we had arrested Bonacorci for selling this liquor, told him what kind of liquor it was, what rotten stuff it was and he said that he had been sick for a few days at about the time of Bonacourci's arrest and made some kind of an excuse. He said Bonacorci was working for him there in the restaurant and Bonacorci told me that too when I arrested Bonacorci. I told Strada that Bonacorci had said "Why don't you arrest Strada, I am only working for him." Then Strada said he didn't tell him to violate the law or something to that effect.

A jar or can was then introduced as United States Exhibit #6 and received as evidence. This can was about one fourth full of liquor and the witness stated that it was whiskey. The contents of the can was whiskey.

(Testimony of George M. Sears.)

CROSS EXAMINATION.

BY MR. BURCH:

Immediately after the arrest of Bonacorci, I asked the cook where Strada was. He did not tell me. Referring to United States Exhibit #3 witness testified as follows:

I took this from Mr. Rocheford. I searched him before he went in the restaurant and kept him in sight so that no one could have given him the bottle and when he came out I found the bottle on him. Rocheford told me he got the bottle from the waiter in the Flor de Italia restaurant. He described the waiter to us. He did not know his name. He told me how much he paid for the bottle of liquor.

RE-DIRECT EXAMINATION

BY MR. ELLIS:

Q. How frequently have you seen, if at all the defendant Strada about this place, how much time did you spend there on an average at his place?

MR. WISSBURG: We object to that as immaterial, Your Honor.

THE COURT: Overruled.

A. Sometimes we got sent down there two or three times a week, sometimes were by there every day; complaints on this place for bootlegging for the last two years, drunks came in and out of there; they did a lot of business at that place and Strada is practically running it all the time.

(Testimony of George M. Sears.)

MR. WISSBURG: We object to the answer and ask the jury be instructed to disregard the statement made.

THE COURT: About complaints being made about bootlegging, the fact that they got down there frequently is not, and that Strada was there was material.

We were down there every day on our regular police duty, in that neighborhood, sometimes half a dozen times a day. I don't remember going to the place prior to the 8th day of November. I saw Strada there every day and knew that he was the proprietor of the place. He owned and managed it.

RE-CROSS EXAMINATION

BY MR. BURCH:

It came a part of my regular duties to keep my eye on lower Fifth Street along about 5th and I. Streets. We have searched Strada's place a number of times, but did not find anything. We found glasses on the tables and bottles lying around through the place that had a teaspoonful of such a matter of whiskey and alcohol in them.

Reference was then made to three jars then in the court room containing some liquid. These jars were not introduced in evidence. Witness stated:

I didn't say that that is whiskey in those jars. Strada has been arrested about half a dozen times I think prior to this time. I cannot state them, but to the best of my knowledge he has. I can't tell when he was arrested before. It was in 1920 or 1921.

(Testimony of George M. Sears.)

I had a talk with Strada some days after he was arrested. I told him there was a warrant for him and Bonacorci and that the hearing was set in the Commissioners Court. I told him about the sale of whiskey to Rocheford. I got the bottle and evidence there and told him what kind of liquor it was. I told him it was rotten stuff, a man that put that stuff out and was selling it ought to be ashamed of himself. He had not been arrested at that time. I told Strada that Bonacorci said when we arrested him "why don't you arrest Strada, who is the boss of this place, he is maintaining it." Those were the words as I remember them. Strada said he had been sick for four or five days, and hadn't been down to the place. He didn't say that he didn't know about it. He didn't say anything in response to what I told him that the waiter told me.

BY MR. BURCH:

I think Strada told us that Bonacorci was working for him as a waiter in the restaurant—that he had told him not to violate the law.

- o O o -

R. W. CHADWICK

A witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ELLIS:

I was a police officer in the months of October and November, 1920. I accompanied Mr. Sears on the

(Testimony of R. W. Chadwick.)

occasion on which he testified. Officer Rocheford went into the place and when he came out he walked up to the corner and we stopped him, searched him and found a pint bottle of liquor in his pocket. He was with a lady at the time. We searched him earlier in the evening. He was in our sight from that time until he went into the restaurant. He was in the restaurant about 45 minutes. I was sitting in a machine across on the other corner. He had gone about 30 feet when we searched him. United States Exhibit #3 is the bottle that I took from Rocheford's pocket that morning. I know what is in that bottle. There is whiskey in that bottle. I took United States Exhibit #6 from the shelf along side the range—that was in a teapot at the time, while Officer Sears was getting the glasses from the dining room. Officer Sears went to the tables to where Mr. Rocheford and this lady had been served, and also to a table where there was another party being served, and I went into the kitchen. As I went into the kitchen the cook had taken a cup which also had whiskey in it and poured the contents of this whiskey into a large kettle of soup that was cooking on the stove at the time, and right over from this stove were three shelves where a person would set pans or something on, and on the second shelf was this teapot, about that high, and the contents of the teapot I poured out. That is the same stuff, I know what it is; it is whiskey. It is the same

(Testimony of R. W. Chadwick.)

as in United States Exhibit #3 bottle. There was a waiter in the restaurant. I do not know his name. There were two Mexicans and two American people in there also. There were two people working there, a chef and a waiter. I have seen the defendant Strada in the place a number of times. I visited the place probably fifty times. We visited the place two or three times from the first of October until the 8th of November. I remember Strada being there on one occasion during that period. I remember talking to him that time. I never talked to him about this case. I was there when Officer Sears talked to him about the case. I told him the waiter wanted to know why we would arrest him and not arrest Strada as he was only working for Strada. That was a few days after the arrest. Strada told me that Bonacorci was working for him. I heard Officer Sears tell him that the time the hearing would be before the Commissioner, and that he was mentioned in the complaint also, and of maintaining the place. Mr. Strada stated at that time that he wasn't there, at the time that he was sick, but that this man, Bonacorci, was working for him.

CROSS EXAMINATION

BY MR. WISSBURG:

I did not hear all of the conversation between Mr. Strada and Sears. We searched Mr. Rocheford before he went in, and gave him marked money and we stood down the street about 100 yards from where

(Testimony of R. W. Chadwick.)

he was to meet this party. We watched Rocheford and saw him meet the woman and go into the restaurant together. I did not search the woman. We searched the place about two minutes after the transaction. I made no effort to look for the marked money. I couldn't say whether the marked money was in the cash drawer or not. It was not in Bonacorci's pocket. Sears and I worked in the neighborhood of lower Fifth Street quite a bit. We are in that neighborhood about an hour every evening. I do not wish to leave the Court and jury with the impression that we were merely hanging around to search this place. I have been in Strada's place a number of times. I have searched the place but did not find anything. We probably searched the place two or three times from the first day of October until November 8th. We did not find liquor or wine at the time we made these searches, but we didn't go into the cellar. I can remember finding there was some empty bottles some would have a small amount, and some would have a very very small portion of liquor. At that Mr. Strada thinks that stuff there was brought in by other people. During the time we were making these searches I referred to we didn't go where we should have went. I think that is the reason we did not find any liquor. We have never been in that cellar yet. The reason I say that I know we would have found something there is that we had information

(Testimony of R. W. Chadwick.)

from different sources. The gist of my testimony here is not from information received from other sources. I am testifying from facts I have gathered myself from my own investigation. I believe it is a fact that I would have found something in the cellar had I looked for it. To the best of my knowledge we would have found something; to the best of my ability it is a fact. Strada had been proprietor of this place quite a while before this. He told me he had been sick for four or five days during this week. That was a week or so after the arrest. I did not notify Mr. Strada at the time of the arrest of Bonacorci. It was some time after this that I notified Strada. It was about a week afterwards. I do not know where Bonacorci is now. I know who the woman was, but I didn't search her at all.

RE-DIRECT EXAMINATION

BY MR. ELLIS:

I don't know whether Strada had been served with process at the time I spoke to him. We told him his name was in the indictment in company with Bonacorci and Officer Sears told him at that time when his case, along with Bonacorci's would come before the commissioner. We made a search of Bonacorci, but did not find the marked money.

Both Strada and Bonacorci were charged with the offense at the same time before the Commissioner. The record of the Commissioner who issued the war-

(Testimony of H. N. Ellis.)

rant was thereupon produced in court and circumstances of same stated by the court as follows:

THE COURT: It shows a warrant for them both issued on the 10th day of November.

DEFENDANT'S CASE

DIRECT EXAMINATION OF H. N. ELLIS.

By MR. WISSBURG:

I am the Assistant District Attorney.

Q. On the 12th of September last year, was there or was there not a case pending in this Court against one Bonacorci, Joseph Bonacorci?

THE COURT: What had that got to do with this case?

MR. WISSBURG: We want to show that there was a case pending against Bonacorci. That Bonacorci has fled the jurisdiction and forfeited his bond in this case.

MR. ELLIS: Object to it as immaterial.

THE COURT: Yes, it is highly immaterial, and has nothing to do with this case at all. We are trying this man.

Q. Does the information in that case, Mr. Ellis recite the fact that the whiskey was bought from Bonacorci?

THE COURT: That is immaterial. We are trying this man in this case.

MR. WISSBURG: Note an exception to that.

- o O o -

(Testimony of Louis C. Strada.)

LOUIS C. STRADA, the defendant herein having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WISSBURG:

I am the proprietor of the Flor de Italia Restaurant at Fifth and I. Streets. On the 8th of October and during the 8th of November of last year, there was a man working for me by the name of Bonacorci. I do not know where he is now. I did not have any wine in my place about the 8th of October of thereabouts. I had what we call grape juice. I have grape juice. Would buy it by the barrel in San Francisco and sell it. I had grape juice in my possession all the time. I was dispensing grape juice at that time. I was dispensing it by the drink, and by the bottle and by the gallon. Any way they would call for it. Some young fellows would come in and call for Dago red; that means grape juice and I would give them grape juice. I never had any wine other than this grape juice. I do not know whether or not any wine was dispensed in my place. It was not dispensed with my knowledge. About the 8th of November, last year, I was sick. I had the flue and sore throat. I asked Bonacorci if he could run the place until I got well, two or three days, and if he couldn't I would get a man, because I couldn't work. I went home and went to bed. There was no liquor in my place when I left to go home. I did not

(Testimony of Louis C. Strada.)

tell him then about not violating the law, because they know it I didn't have anything there. I didn't have any reason to tell them.

The defendant being shown United States Exhibit #3 said,

I have not seen this bottle of whiskey before. I didn't see it in my place of business when I left on November 7th. I don't know whether it was there.

The witness was then shown United States Exhibit #6 and stated in reference thereto:

We have empty jars there. I did not see the whiskey now in that jar. I first knew that they got whiskey there on November 8th. Mr. Burch called up my wife. I was at home and in bed. He told her that there was trouble down in the restaurant. I came down town three days afterward. I think it was the 10th or 11th. I recall having seen Mr. Chadwick and Mr. Sears. I was going up to mail a letter at 5th and Market Street. I met the two officers and they told me what had happened. I told them I knew nothing at all, because I was at home. I told them, if he is in jail, let him stay there, because he had no right to do it. They do it to make money whatever I told them. I have been running this cafe for four or five years, and it is my means of livelihood.

CROSS EXAMINATION

BY MR. ELLIS:

The price of the grape juice was 25¢ a coffee cup. It was a regular coffee cup.

(Testimony of Louis C. Strada.)

United States Exhibits #1 and #2 were shown to the witness whereupon he stated that the coffee cups in which he served grape juice was three times larger than those.

I sometimes serve it in glasses; sometimes we have glasses, and sometimes in cups. Bonacorci was working for me. He was a dish washer. I don't know whether he served the guests there sometimes besides or not. He don't have any right to do it. The officers came to my place once in a while. I never remonstrated with the help about doing such things. I didn't pay much attention. I know I ain't got nothing there, I don't care if they go down in the basement or kitchen don't mind me much. I think I told Officer Sears that I told this man that they know they can't sell anything like that. I don't remember whether I told Officer Sears that I had told Bonacorci that I didn't want him to violate the law. I don't think I did; I don't remember. There is soldiers our of service come in under the influence of liquor and raise trouble there. Sometimes they would have a bottle of alcohol on them and put it on the table and order four cups of Dago Red and as soon as we brought the grape juice, they would put alcohol in it. I told the man that if anything happened like that not to serve them. No I had not warned Bonacorci about selling liquor there. They told me that Bonacorci was arrested, and I said "well if he did it is up to him."

(Testimony of Louis C. Strada.)

They told me that he was arrested for selling a half pint to an officer. I was at the restaurant practically all the time except the days that I was sick from eleven o'clock until nine or ten until I closed up. I sometimes leave the place for an hour or so but not more. I am managing the restaurant, and this man Bonacorci was washing dishes. When people came in and asked for Dago red I filled their orders and charged them two-bits for a big coffee cup. I have those kind of cups at my place (referring to United States Exhibits #1 and #2). Those cups came from my place. I did not know that there was a teapot in the kitchen containing liquor. It wasn't there when I left the place. Two sailors bought some whiskey from a man by the name of Fred Moore, he was a waiter in from at that time. He did extra work for me on Saturdays and Sundays. The time I was in the restaurant the man didn't sell liquor. I never cautioned Bonicorci about this event in my restaurant and did not tell him not to have that repeated. When I was home, then he might have sold it for himself to make some side money and things like that. He could have served it to guests at the time I was absent, not at other times. I was only absent three days in all. When I was there he never came out of the kitchen. Would go in in the morning and go home at noon.

(Testimony of Louis C. Strada.)

RE-DIRECT EXAMINATION

BY MR. WISSBURG:

We served black coffee there and used these cups. I have four or five dozen of them at the restaurant. When people would come in and ask for Dago Red, I would give them grape juice. They would pay two bits a coffee cup.

BY THE COURT:

I have three or four dozen drinking glasses there. They are water glasses. I serve the grape juice in coffee cups because the drinking glasses are too big. The cups were just right, the way I figured it, to get my profit out of it. A cupful looks better than half a glass when you serve it. All of my glasses are big water glasses. They are bigger than those glasses (Referring to United States Exhibits #4 and #5). Mr. Sears when I saw him, asked me if I knew what had happened at my place; I said "yes." He told me I was under arrest too and I had better go down to the Commissioners. I told him I would go down there in the morning and see. I told him I didn't have anything down there and if Bonacorci sold it, it was up to him. I told Sears when I left the place there wasn't any liquor there. All that I sold was grape juice. I never sold anything stronger than that. I mean if Bonacorci sold it, he had it himself and it was up to him. Sears then told me to go down to see the commissioner

(Testimony of Katherine Strada.)

RE-CROSS EXAMINATION

BY MR. ELLIS:

I used to have the wine glasses when I had a license At that time I had eight or nine of them altogether (Referring to United States Exhibits #4 and #5). The coffee cups are about the same size, a little larger I think and hold a little more. I don't know whether Sears and Chadwick told me that Conacorci said I was the one selling the liquor there. Bonacorci has been in this country about two years. I don't think he can understand English and cannot speak it. They did not tell me at the time that Bonacorci said I ought to be arrested along with him, because I was responsible. I don't remember if he did.

- o O o -

KATHERINE STRADA, a witness called on behalf of the defendant having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WISSBURG:

I am the wife of Mr. Strada. On November 7, of last year, Mr. Strada took sick. He was at home. He came home about 10:30 o'clock and about 1 o'clock he went to bed. He stayed in bed about two or three days. Mr. Burch called me up over the 'phone. Mr. Strada was in bed at that time. Defendant then rested.

That thereafter, on the 31st day of October, 1921 the jury returned a verdict finding the defendant guilty as alleged in the second count of indictment and disagreeing as to the first count in the indictment.

That thereafter to-wit on the first day of November, 1921, defendant being present in open Court with his attorneys, A. L. Wissburg and C. E. Burch, the Court duly and regularly pronounced sentence upon the defendant and adjudged that he be confined in the County jail in San Diego County of San Diego, State of California for a period of one year.

That thereafter, on the 5th day of November, 1921, the defendant duly and regularly filed in this Court a petition for Writ of Errors, accompanying the same with his Assignment and Specifications of Errors; that said Petition for Writ of Errors was thereafter allowed, and said Writ of Errors thereafter duly and regularly issued.

That the Court duly and regularly fixed a Supercedeas Bond in the sum of Twenty-five Hundred ($2500.00) Dollars. That upon the issuance of the Writ of Errors returnable before the United States Circuit Court of Appeals for the Ninth Circuit, a citation was duly and regularly issued herein.

That thereafter the Court duly and regularly entered its order in said case allowing the defendant herein time within which to prepare, serve and file his proposed Bill of Exceptions in the above entitled action.

That thereafter and on the 25th day of November, defendant served his proposed Bill of Exceptions. Thereafter the Court proposed certain amendments to the Bill of Exceptions which are herein above inserted. Said Bill is now submitted for approval and defendant respectfully prays and asks that the same be allowed.

A. L. Wissburg
Jas. E. O'Keefe
C H Van Winkle

Attorneys for Defendant

To Joe Burke, Esquire, United States Attorney,
Sir:

YOU WILL PLEASE TAKE NOTICE, that the foregoing constitutes and is the Bill of Exceptions proposed by the defendant as amended pursuant to suggestions of the Court in the above entitled action and that the defendant will ask the allowance of same.

A. L. Wissburg
Jas. E. O'Keefe
C. H. Van Winkle

THE ABOVE AND FOREGOING BILL OF EXCEPTIONS having been presented within the time allowed by law to the Court for settlement, and the same having been considered, the Court now hereby approves, settles and allows the same and orders it of record as the Bill of Exceptions herein.

Dated this 29th day of December, 1921.

Bledsoe

Judge

IT IS HEREBY STIPULATED that the foregoing Bill of Exceptions is correct; that the same may be settled and allowed by the Court.

A. L. Wissburg

Jas E O'Keefe

C. H. Van Winkle

Attorneys for Louis Strada, defendant and plaintiff in error.

Joe Burke

United States Attorney
By Herbert N. Ellis

Assistant United States Atty

RECEIVED COPY of the within proposed Bill of Exceptions this 1st day of December, 1921.

Joe Burke United States Atty.

Herbert N. Ellis assistant

(ENDORSED): *No.* 3287 Crim IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT *of* CALIFORNIA SOUTHERN DIVISION UNITED STATES OF AMERICA, Plaintiff, *vs.* LOUIS STRADA, Defendant. BILL OF EXCEPTIONS FILED Dec. 29, 1921 CHAS. N. WILLIAMS, Clerk. *By* Wm. U. Handy, *Deputy Clerk*

Original

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

No. 3287 Crim.

The United States of America,
Plaintiff,
vs.
LOUIS STRADA,
Defendant.

COST BOND

KNOW ALL MEN BY THESE PRESENTS, that I, Louis Strada, as Principal, and Maurice Bernardini and Maria Massa, as sureties, are held and firmly bound unto the United States of America, in the sum of Two Hundred & Fifty Dollars ($250.00) for the payment of which, well and truly be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this 5th day of November, 1921.

The condition of this obligation is such, that whereas, on the 5th day of November, 1921, by the consideration of the District Court of the United States for the Southern District of California, in a certain criminal cause, to-wit: a certain information against the above named Louis Strada for having maintained a nuisance,

(being Criminal Cause No. 3287) the said Louis Strada was adjudged and sentenced to a term of twelve months in the County at San Diego, California, and Whereas, upon the petition of the said Louis Strada, Benjamin F. Bledsoe, District Judge of the said United States for the Southern District of California, within this district, has allowed a writ of Error for the United States Circuit Court of Appeals for the Ninth Circuit to the said District Court upon the judgment and sentence aforesaid, and has ordered that such writ of error operate as a stay of proceedings under the said judgment and sentence, and Whereas, such writ of Error has accordingly issued:

Now Therefore, the condition of this obligation is such that if the said Louis Strada shall prosecute his writ to effect and answer all damages, fine and costs, including just damages for delay and costs and interest on Appeal, if he fails to make his plea good, then his obligation shall be void, otherwise shall remain in full force.

Louis C. Strada (Seal)
Principal
Maurice Bernardini (Seal)
(SEAL) Maria Massa (Seal)
Sureties

Signed & acknowledged before me this 5th day of Nov. 1921

Glen H. Munkelt
U. S. Commissioner

Subscribed and sworn to before me
this 5th. day of November 1921.

Glen H. Munkelt
United States Commissioner

Southern District of California ss.

Maurice Bernardini and Maria Massa each for himself and herself being duly sworn deposes and says: that he and she are worth the sum of Two Hundred and Fifty Dollars exclusive of property exempt from execution and over and above all debts and liabilities.

Maurice Bernardini
Maria Massa

(SEAL)

Subscrived and sworn to before me
this 5th day of November 1921.

Glen H. Munkelt
United States Commissioner.

(ENDORSED): Original No. 3287 Crim. In the District Court of the United States for the Southern District of California Southern Division The United States of America, Plaintiff, vs. LOUIS STRADA, Defendant. Cost Bond. Filed Nov 5 1921 *Chas. N. Williams, Clerk* Wm. U. Handy, *Deputy* C. E. Burch & A. L. Wissburg, Attorneys for Defendant. Approved Bledsoe Judge 11/5/21 B

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 3287-Crim

THE UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	PRAECIPE
LOUIS STRADA,	)	
Defendant.	)	

To the Clerk of said Court:

Sir:

Please issue certified transcript on Writ of Error to the United States Circuit Court of Appeals, the same to include the judgment roll, Bill of Exceptions, Petition for Writ of Error, Order allowing Writ of Error, and fixing supercedious bond, Writ of Error, Bond on Writ of Error, Citation, Assignment of Errors, and this Praecipe.

A. L. Wissburg
Jas. E. O'Keefe
C. H. Van Winkle
Attorneys for Louis Strada, defendant and plaintiff in error.

(ENDORSED) 3287-Crim IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION. THE UNITED STATES OF AMERICA Plaintiff vs LOUIS STRADA, Defendant PRAECIPE Filed Nov. 25 1921 *Chas. N. Williams, Clerk* R S Zimmerman *Deputy* A. L. Wissburg 411-14 Southern Title Building San Diego, California Attorney for Defendant

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

LOUIS STRADA,)
)
Plaintiff in Error.)
)
vs.)
)
The United States of America,)
)
Defendant in Error.)

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 68 pages, numbered from 1 to 68 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by the plaintiff in error and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the judgment roll, bill of exceptions, petition for writ of error, order allowing writ of error, and

fixing supersedeas bond, writ of error, bond on writ of error, citation, assignment of errors and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on writ of error amount to , and that said amount has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of January, in the year of our Lord One Thousand Nine Hundred and Twenty-two, and of our Independence the One Hundred and Forty sixth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By
Deputy.

UNITED STATES *No.* 3825

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

LOUIS STRADA,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

A. L. WISSBURG,
Attorney for Plaintiff in Error.

O'KEEFE & VAN WINKLE,
Of Counsel.

Filed this.....day of April, 1922.

FILED
APR 19 1922
F. D. MONCKTON,
CLERK.

WATSON-JONES, INC., PRINTERS, SAN DIEGO, CAL.

No. 3825

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

LOUIS STRADA,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Opening Brief of Plaintiff in Error.

STATEMENT OF CASE.

The information herein charges plaintiff in error with violation of Sections 3 and 21 title II National Prohibition Act of October 28, 1919. The information is in two counts. The first count thereof charges the defendant and plaintiff in error with the sale of one-half pint of whiskey containing alcohol in excess of ½ of 1% alcohol by volume said whiskey being intoxicating liquor, fit for beverage purposes, in violation of Section 3 title II of the National Prohibition Act of October 28, 1919.

Second count of the information charges that on or about the 8th day of October, 1920, to and including the 8th day of November, 1920, in San Diego, County of San Diego, the plaintiff in error, knowingly, wilfully and unlawfully main-

tained a common nuisance, to-wit: a room, building and place containing intoxicating liquor, to-wit: wine and whiskey containing alcohol in excess of ½ of 1% of alcohol by volume and same were sold, bartered and given away in violation of Section 21, title II of the National Prohibition Act of October 28, 1919; to which information and each count thereof the defendant pleaded not guilty.

Trial of the cause was had on October 31, 1921. The verdict of the jury was as follows: "We, the jury in the above entitled cause, find the defendant, Louis Strada, ... as charged in the first count of the information; and guilty as charged in the second count of the information. San Diego, California, October 31, 1921, John N. Haskell, foreman." Transcript of Record p. 18.

Motion to set aside the verdict, and in arrest of judgment were duly made by counsel for the defendant and plaintiff in error and were by the court denied, whereupon the court pronounced judgment that the defendant stand committed to the San Diego County Jail for the term and period of one year on the second count. Defendant excepted to the judgment of the court and the denial of the motions aforesaid (T. R. pp. 19 and 20.)

ARGUMENT.

Plaintiff in error contends that the evidence was insufficient to justify the verdict of the jury

as to the second count in the information, in that the evidence failed to show, First, that there was sold on the premises, referred to in the information, intoxicating liquor containing more than one-half of 1% alcohol by volume and Second, that the said Strada had knowledge of the alleged sale or the keeping of the same on the premises, if any sales were made or any of said intoxicating liquors were kept on the premises.

As to the first contention that the evidence does not support the conclusion that there were sales of intoxicating liquors containing by volume more than one-half of one per cent. alcohol, we beg to briefly call the court's attention to the testimony given by the witnesses for the government at the trial relating to this issue.

B. M. Mossholder, a witness for the government testified in substance, (T. R., pp. 34 to 37, inclusive), I bought a drink of wine from a man named Joe and paid him therefor 50c. I don't know what he did with the money, I did not get the drink from Strada; do not know whether this property was Joe's or Strada's. I could not swear under oath that the alcoholic contents of this wine was more than one-half of 1%. He brought in what I call "Dago Red". On cross-examination the witness testified that Dago Red looks like grape juice, and that Dago Red contains more

than one-half of 1% alcohol in volume. I did not call for Dago Red.

J. J. FINNEGAN, a witness for the government testified in substance: (T.R.,pp. 37 to 41 incl.). I went to the front of the cafe and spoke to Strada. This was September 30, 1920. I told him I wanted whiskey. He said that he was out, but had a little wine. And the witness purchased this alleged wine and paid therefor the sum of 50c. It is not clear from the testimony of this witness that defendant, Strada served him with this alleged wine. On page 39 (T. R.) the witness testified on direct examination: Strada has never sold me wine. Strada didn't serve me, he told me to go to the rear of the store, the first time. I did not see the waiter talking to Strada at this time. On cross examination, the witness testified "I call what was served me Dago Red". On recross examination page 41, the witness testified "I did not get any whiskey there. I did not speak to Mr. Strada about any whiskey."

HUGH ROCHEFORD, a witness for the government testified (T. R., pp. 41 to 43 inclusive). On November 28 witness testified that he was served with whiskey in a mug, and that there accompanied him at the time, a woman who was also served in like manner, and that the same was served by Bonacorsi and he bought one-half pint of whiskey and paid $4.00 for it to this said last

mentioned person. Did not see Strada there that night, and don't know whether he (Strada) got the money or not. Don't know where this waiter got the liquor from. It was stipulated that this liquid contained in excess of one-half of 1% in alcohol by volume. Witness further testified (T. R., pp. 43), It might be fit for beverage purposes for some people, but it wouldn't be for me. We call the court's attention that the first count of the information alleges the sale of whiskey at the time and place as testified to by this witness. The jury, however, were unable to reach a verdict as to the first count of the information.

George Sears, a witness for the government testified (T. R., pp. 44 to 49 inclusive). Witness is a police officer of the City of San Diego, California. He received the bottle of whiskey alleged to have been purchased by the witness Rocheford, after Mr. Rocheford came out on the street. This bottle of liquor was received as evidence as the government's exhibit 3. This witness was allowed to testify as to the reputation of this place in a general way, and made statements that the defendant Strada was arrested a number of times previous, but the witness did not state upon what charge, and also the complaint of bootlegging had been made concerning Strada's place. The witness's testimony in this particular was most vague and uncertain, and should not be entitled to any

weight, same being mere conclusions of the witness and entirely hearsay, based on rumors.

R. W. CHADWICK, a police officer of the City of San Diego also testified for the government (T. R., pp. 49 to 54, inclusive). Testimony of this witness corroborated the testimony of officer Sears. And also developed the testimony that in a tea pot in the kitchen of said defendant, the witness found some liquid, which he described as whiskey, and being the same as government's Exhibit 3. It does not appear how much whiskey was in this tea pot. The contents of the tea pot was poured into another receptacle, as government Exhibit 6 in the trial of the action. Neither officers Chadwick nor Sears testified that the defendant Strada was there that night, or at the time that the place was visited by these officers, and the same being the night when the bottle of whiskey was sold to the witness Rocheford. Witness Sears testified (T. R., pp. 49). That some days afterward he had a talk with defendant Strada, and the defendant stated that he had been sick for four or five days. And testified that he thought Strada told him that Bonacorsi was working for him as a waiter, and that he (Strada) had told Bonacorsi not to violate the law.

Defendant Strada testified on his own behalf, and also his wife Katherine Strada (T. R. pp. 55 to 60, inclusive). Both witnesses testified to lack

of knowledge of any sale of intoxicating liquor on said premises, containing in excess of one-half of 1% alcohol, also that on the date of the alleged sale of the bottle of whiskey to Rocheford, that the defendant Strada was home, sick in bed. Mr. Strada also attempted to show that he had on the premises grape juice, and that he purchased grape juice. (T. R., p. 65.)

We submit that there is an entire lack of evidence tending to show that the beverages at Strada's place, contained more than one-half of 1% alcohol in volume, except as to the bottle of whiskey, which was alleged to have been sold but on which the jury were unable to reach a verdict. And we may reasonably presume that the jury were unable to determine that this sale of whiskey was with Strada's knowledge.

U. S. vs. *Dodson,* 268 Federal, 397.

Such evidence is insufficient to support the theory that the plaintiff in error had knowledge of any alleged sale or of the presence of the alleged intoxicating liquor or that he knew it was being kept on the premises.

Moran vs. *U. S.,* 264 Federal, 768;
Ousler, vs. *U. S.,* 263 Federal, 968;
Yassee vs. *U. S.,* 276 Fed., 497;
Holmes vs. *U. S.,* 269 Fed., 489;
Wiggins vs. *U. S.,* 272 Federal, 41.

Nor does it appear from the evidence that the sales were continuous or recurrent.

U. S. vs. *Cohen,* 268, Fed., 420.

The court erred in over-ruling plaintiff in error's objection to the following question:

Q. What did you do on that occasion (September 30, 1920)? Objected to on the grounds that the question is incompetent, irrelevant and immaterial, and not covered by the pleading. (T. R., p. 27.)

State vs. *Benson,* 154 Iowa, 313, (134, N. W., 851).

The court erred in refusing to permit the plaintiff in error to testify in response to the following question (T. R., p. 31):

Q. Mr. Strada along about the 7th day of October and on or about the 13th day of November, did you get a barrel of grape juice from the California Importing Company? Which question was objected to by the government and the objection sustained, as was also,

Q. How did you buy grape juice?

This testimony was intended as a part of Mr. Strada's defense. He had a right, we submit, to show, that he had grape juice on the premises for sale. And which fact would be some evidence to explain Mr. Strada's statement to the gov-

ernment's witness Finnegan, when Mr. Finnegan asked Mr. Strada if he could fix him up a little drink or words to that effect. Mr. Strada told him to go to the back of the store. And it would not be out of the ordinary, if Mr. Strada referred to this grape juice as wine. And the fact that grape juice was being sold in this restaurant would make it very easy for the waiters to carry on a little business "on the side" and for their own profit and without the proprietor's knowledge. We, therefore, believe that Mr. Strada should have been permitted to have shown fully his defense in this particular.

It is respectfully submitted that the judgment of the District Court should be reversed.

A. L. Wissburg,
Attorney for Plaintiff in Error.

O'Keefe and Van Winkle,
Of Counsel.

UNITED STATES *No.* 3825

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

LOUIS STRADA,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR RE-HEARING

A. L. WISSBURG,
Attorney for Plaintiff in Error.

O'KEEFE & VAN WINKLE,
Of Counsel.

Filed this.....day of June, 1922.

FILED
JUL 3 - 1922
F. D. MONCKTON,
CLERK

WATSON-JONES, INC., PRINTERS, SAN DIEGO, CAL.

No. 3825

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS STRADA,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR RE-HEARING

Now comes the plaintiff in error, Louis Strada, and moves this Honorable Court for a rehearing of its decision in said cause rendered on June 5, 1922, and in support of his motion respectfully submits:

The court in its opinion citing *Lewinsohn* vs. *United States,* 278 Federal, 421, uses the following language: "The continuity of wrong doing implied in the charge of maintaining a nuisance may sufficiently appear from the nature and circumstances of a single transaction". The case cited in dealing with this point uses the following language, "There could be, however, an almost irrefutable conclusion drawn from a single sale, provided the facts surrounding such sale warranted the inference that it was one of the ordinary and usual incidents of the business there

conducted." The purchaser there entered the place, inquired about the price of whiskey, put his money on the bar and asked for whiskey. Defendant poured out some beverage and gave it to the customer. In the Lewinsohn case supra, apparently the defendant was conducting a soft drink establishment with all the appurtenances of a saloon, and the sale, so made was an ordinary and usual incident of the business there conducted. In the case at bar, however, the plaintiff in error was conducting a restaurant and employed a number of waiters for the purpose of serving food to his patrons, and the selling of whiskey and liquors prohibited by the Volstead Act was not an ordinary and usual incident of his business. Also in the present case, there is no such proof, or any proof whatsoever as to a sale made by Mr. Strada, the plaintiff in error.

We submit that the rule laid down in *United States* vs. *Cohen,* 268 Fed., 420, is applicable to and should govern the present case.

Further, the court in its opinion, in the present case, uses the following language, "So here from the sales made by the defendant in person on September 30." We respectfully submit that there is no testimony on which a conclusion could be reached that the defendant personally made a sale on September 30th or at any other time. We beg the indulgence of the court to set forth the testi-

mony of J. J. Finnegan, the only witness on behalf of the United States who testified relative to a sale made by the plaintiff in error at any time.

Transcript of Record, pages 37 to 41:

"J. J. Finnegan, a witness called on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ellis:

I was a deputy sheriff in October, 1920. I went to this place, this restaurant, about September 30. I heard what the witness, Mr. Mossholder, said.

Q. What did you do on that occasion?

Mr. Burch: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Burch: Not covered by the pleadings September 30.

The Court: Overruled.

Mr. Burch: Exception.

I first went to the front of the Cafe and spoke to Mr. Strada. He told me to go to the back room which I did. I asked Mr. Strada if he could fix me up for a little drink. He asked me who I was. I told him I had been there several times before. He told me to sit down and asked me what kind of drink I wanted. I first told him I wanted whiskey. He said he was all out of that but had a little wine. I asked him how much it was and he said he usually charged seventy-five cents

but would give it to me for fifty cents. I said all right to give it to me, which he did. I was then in the rear of the room on the right hand side of the restaurant which is located on Fifth and I Street on the Northwest corner, when he served that to me. I am talking about the defendant Mr. Strada. I went there the following night. I ordered a drink from a big fat fellow. Strada was in the front part of the restaurant. I got wine. The waiter told me that he was afraid to give it to me.

Mr. Burch: I object to that as incompetent, irrelevant and immaterial. It does not have a tendency at all to bind Strada.

The Court: Overruled.

Mr. Burch: Exception.

I asked him why he was afraid. He told me that I didnt look good to him. I waited at the table and he served me with wine. I know what wine is. I paid fifty cents a cup. It was served in a little tea cup. I had about 8 or 9 cups of wine.

Q. Did you feel any effects of it?

A. I think I did, you bet. The effect it had on me was that I was about half intoxicated when I left the restaurant. I did not notice Strada when I went out. The last recollection I had he was there. I went there again on October 3 with Mr. Mossholder, Mr. Mossholder and I went in the side entrance. We ordered wine. We got one drink of wine at that time. I paid fifty cents a cup; there were two cups. I dont remember seeing Strada there that time. The first time that I went in that restaurant I saw this

other man in there. Stradá didn't serve me; he told me to go to the rear of the store the first time where the big fellow served me. Strada has never sold me wine. Strada sent me back to the rear to get what I wanted. The man who served me the first evening was the man who served Mr. Mossholder and me the last time. When the waiter came in I told him that I was speaking to the Boss and I wanted a drink. He wanted to know what boss I had been speaking to and I told him the boss up in front. Before serving me he went to the front of the building where the defendant was. I did not see him with the defendant. I was in a booth in the rear. He then came back and served me."

Cross Examination

By Mr. Wissburg:

"I was working from the sheriff's office when I went to that restaurant with Mr. Mossholder for the purpose of getting evidence if I could. Strada did not serve me at any time that evening and I did not hear him tell the waiter anything about serving me. The waiter served me and took my money. I do not know what he did with the money. I did not see him put it in the till. He picked it up and carried it in his hand as far as I could see. I do not know whether he gave it to Mr. Strada or not.

The second evening I was there I had 8 or 9 cups. I went there for the purpose of securing evidence. I did not get a bottle because I did not ask for it. I did not have any drinks there before I went there the second time. Mr. Strada did not wait on me at all when I got the 8 or 9 cups. I call that which

was served me Dago Red. I do not know the different kinds of Dago Red, as to the quantity of alcoholic contents.

I am an automobile salesman and have been for about seven years. I had been engaged in working with the sheriff in getting evidence about drinks for seven months at the time I went to Mr. Strada's. I did not take any of the drinks out of the cups. I drank every bit of it. I cannot state what per cent of alcohol that contained. I have no idea what per cent it contained."

RE-DIRECT EXAMINATION

By Mr. Ellis:

"The drink that I got when I went with Mr. Mossholder was the same kind of wine I had purchased at the time when I drank 8 or 9 cups of it. It was the same stuff. I did not feel any effect of this one cup. By the taste of it it was the same stuff."

RE-CROSS EXAMINATION

By Mr. Wissburg:

I did not get any whiskey there. I did not speak to Mr. Strada about whiskey. Mr. Strada was in the front all the time that I was in the rear. I was never served any whiskey."

This witness' testimony on direct and cross examination is inconsistent and cannot be harmonized. Can the court reasonably say from this testimony that the plaintiff in error did, in person, make a sale on September 30? The jury did

not find the plaintiff in error guilty of a sale at any time, and were unable to reach a verdict as to the first count of the information.

Transcript of Record page 7.

Transcript of Record page 18.

Mr. Strada, the plaintiff in error admitted that he had grape juice on the premises and was selling this product to his customers and it would not be out of the ordinary if he referred to this product as wine in his conversation with Mr. Finnegan.

> "To constitute a place a common nuisance which may be closed to use by injunction under the National Prohibition Act title 2, section 22, its unlawful use must be with the consent of the owner, or he must have had knowledge or reason to believe it was so used."
>
> *United States* vs. *Butler, et al.,* 278 Fed., 677.

We respectfully request the court to again review the evidence in the present case as disclosed by the transcript of record and to again consider the question as to whether or not the plaintiff in error had knowledge of the alleged sales or whether the same were with his consent or not or whether he had reason to believe that sales of

wine or whiskey were being made in his place of business.

Respectfully submitted,

A. L. WISSBURG,

Attorney for Plaintiff in Error.

O'KEEFE AND VAN WINKLE,

Of Counsel.

I hereby certify that I am attorney for plaintiff in error, and that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

A. L. WISSBURG,

Attorney for Plaintiff in Error.

No. 3829

United States
Circuit Court of Appeals
For the Ninth Circuit.

DAVID B. DRISKILL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Arizona.

FILED
APR 1 - 1922
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

SPENCER B. PUGH, Esquire, 107 Monihon Building, Phoenix, Arizona,

Attorney for Plaintiff in Error.

THOMAS A. FLYNN, Esquire, United States Attorney, JOHN H. LANGSTON, Esquire, Assistant United States Attorney, Federal Building, Phoenix, Arizona,

Attorneys for Defendant in Error. [2*]

C–1323—PHOENIX.

In the District Court of the United States for the District of Arizona.

Indictment.

VIOL. Sec. 3, Tit. 2, Act of Oct. 28, 1919, Possessing and Transporting Intoxicating Liquor.

United States of America,
District of Arizona,—ss.

In the District Court of the United States in and for the District of Arizona, at the April Term Thereof, A. D. 1921.

The grand jurors of the United States, impaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oath present, that DAVID S. DRISKILL, on the 23d day of April, 1921, and within the said District of Arizona, did wilfully and unlawfully possess certain intoxicating liquor fit for beverage purposes, to wit, seven pints of whiskey, nine pints of tequila, and one gallon of

*Page-number appearing at foot of page of original certified Transcript of Record.

intoxicating liquor the exact character of which is to the grand jurors unknown, he, the said David B. Driskill, then and there having no lawful permit to possess the said intoxicating liquor; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, on their oath aforesaid, do further present, that DAVID B. DRISKILL, on the 23d day of April, A. D. 1921, and within the said District of Arizona, did wilfully and unlawfully transport, in a manner and by means to the grand jurors unknown, certain intoxicating liquor fit for beverage purposes, to wit, seven pints of whiskey, nine pints of tequila, and one gallon of intoxicating liquor the exact character of which is to the grand jurors unknown, from a certain house located at number twenty-two hundred and forty-eight West Washington Street, in the City of Phoenix, and District of Arizona, to and into a certain barn situated across the alley from the said twenty-two hundred and forty-eight West Washington Street at the intersection of said alley and Twenty-third Avenue, in said City of Phoenix and District of Arizona, he, the said David B. Driskill, then and there having no lawful permit to transport the said intoxicating liquor; [3] contrary to the form of the statute in such case made and provided and against *and* peace and dignity of the United States of America.

THOMAS A. FLYNN,

United States Attorney for the District of Arizona.

[Endorsements]: C–1323. In the District Court of the United States for the District of Arizona. United States of America vs. David B. Driskill. Indictment. A True Bill. E. T. Collings, Foreman of the Grand Jury.

Witnesses Examined Before the Grand Jury:

Frank Smith, Ella Davis,
E. B. Sisk, Mrs. W. H. Luttner.

Presented to the Court in the presence of the grand jury by their foreman, and filed this 27th day of April, A. D. 1921.

C. R. McFALL,
Clerk.
By Clyde C. Downing,
Chief Deputy Clerk. [4]

Regular April Term, 1921—Wednesday, April 27, 1921—Phoenix.

At a regular term, to wit, the April Term, 1921, of the United States District Court for the District of Arizona, held in the courtroom of the said Court in the Federal Building, in the City of Phoenix, State and District of Arizona, on Wednesday, the 27th day of April, A. D. 1921, at the hour of 9:30 o'clock A. M. Honorable WILLIAM H. SAWTELLE, District Judge of the United States for the District of Arizona, Presiding. Present: JOSEPH P. DILLON, United States Marshal; THOMAS A. FLYNN, United States Attorney; JOHN H. LANGS-

TON, Assistant United States Attorney; C. R. McFALL, Clerk; E. C. SMITH, Bailiff; OSCAR TEMPLE, Bailiff, and EDWARD G. CARLSON, Bailiff.

Court is duly opened by Bailiff Smith, according to law.

(Excerpt from Minutes.)

No. C–1323—(PHOENIX).

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID B. DRISKILL,

Defendant.

Minutes of Court—April 27, 1921—Arraignment and Plea.

The United States Attorney being present on the part of the Government, comes now the defendant herein, David B. Driskill, in open court, in person and by counsel, Spencer B. Pugh, and being arraigned at the bar of this court on the indictment herein, charging him, the said David B. Driskill, with violation of Section 3 of Title 2 of the Act of October 28, 1919, possessing and transporting intoxicating liquor, which said indictment is read to the said defendant and a copy thereof with the endorsements thereon is handed to him. The defendant states that his true name is as set forth in the said indictment, and on being called to plead thereto

he states that he is not guilty, which plea of NOT GUILTY is ordered entered.

(Same Date.)

Minutes of Court—April 27, 1921—Order Setting Cause for Trial.

* * * * * * * *

IT IS ORDERED that the above case be and the same hereby is set for trial April 28th, 1921.

* * * * * * * *

[5]

Regular April Term, 1921—Thursday, April 28, 1921—Phoenix.

At a regular term, to wit, the April, 1921, Term of the United States District Court for the District of Arizona, held in the courtroom of the said court in the Federal Building, in the City of Phoenix, State and District of Arizona, on Thursday, the 28th day of April, A. D. 1921, at the hour of 9:30 o'clock A. M. Honorable WILLIAM H. SAWTELLE, District Judge of the United States for the District of Arizona, Presiding. Present: JOSEPH P. DILLON, United States Marshal; THOMAS A. FLYNN, United States Attorney; JOHN H. LANGSTON, Assistant United States Attorney; C. R. McFALL, Clerk; E. C. SMITH, Bailiff; OSCAR TEMPLE, Bailiff; EDWARD G. CARLSON, Bailiff.

Court is duly opened by Joseph P. Dillon, United States Marshal, according to law.

(Excerpt from Minutes.)

No. C–1323—(PHOENIX).

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID B. DRISKILL,

Defendant.

Minutes of Court—April 28, 1921—Order Continuing Case for Term.

IT IS ORDERED that this case be and the same is hereby continued for the term on a showing made by the defendant.

* * * * * * * *

[6]

In the District Court of the United States in and for the District of Arizona.

No. C–1323.

UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Petition for Restoration of Property and Restraining Order.

To the Honorable District Court of the United States in and for the State of Arizona:

Now comes David B. Driskill, the defendant in

the above-entitled cause, petitioning the Court, and says that he is a citizen of the United States and of the State of Arizona; that on or about the 23d day of April, 1921, your petitioner and his family were the owners of and in the exclusive possession of a certain dwelling-house and outbuildings, chicken-house, and other buildings and yards, same being and constituting a frontage of 150 feet on West Washington Street, Phoenix, Arizona, and running back a distance of about 165 feet to an alley, said dwelling-house being occupied at said time by petitioner and his family as a home and dwelling-house, and said other parts of said premises being upon said property and accessory thereto and a part of the home and premises of your petitioner, said house being numbered as No. 2248, West Washington Street, in said city; that at said time your petitioner and his family, of which he is the head, were the owners of certain other premises in the rear of the north of said above-described property, consisting of a dwelling-house and other outbuildings, including a barn, storehouse and garage immediately adjoining the premises hereinbefore first described [7] and which said barn, storehouse and garage was occupied and used jointly by and between petitioner and a tenant to whom he had rented the dwelling-house on said adjoining premises, said storehouse being used by and accessible alike by said tenants as a storehouse and by the petitioner and his family, same being the barn and family storehouse used at said time by the petitioner and used in connection with his dwelling

and upon his own land and premises and that of his wife and family, and same constituting their homestead, as well as being continuously accessible by and used by said tenants, as an outbuilding and storehouse, jointly with your petitioner.

That on or about said date certain persons and officers, including one Mr. Sisk, special agent of the Department of Justice of the United States, one Daniel J. Lucy, a police officer of the City of Phoenix, and one Fred Weage, Assistant United States Marshal, and others under their charge and direction, unlawfully and without warrant or authority so to do, and without any search-warrant or any warrant whatsoever for said premises, as required by law, entered the aforesaid premises, dwelling-house, garage, barn and storeroom of petitioner on his premises, hereinbefore described, over the protest and without the consent of this petitioner or any other occupant thereof or person thereon or having authority therein or thereabout, and took, carried away and removed from the said premises, to wit, the said barn and storeroom in connection with the same premises and the dwelling-house of petitioner, as petitioner is informed and believes, the following described property, to wit; seven pints of whiskey, nine pints of tequila and one gallon of other intoxicating liquor, and other liquors, together with receptacles in which same were contained, and other property, the nature of which [8] is unknown to your petitioner.

That the acts aforesaid of said officers was in

violation of the 4th and 5th amendments to the Constitution of the United States and that the said property so unlawfully seized is now held by the United States Marshal, J. B. Dillon, and by the office of United States District Attorney and United States Clerk, District of Arizona, as petitioner is informed and verily believes, as evidence against the petitioner as defendant in the above-entitled cause, and that the said officers of the Government propose, intend and are threatening to and about to use the same property, so unlawfully seized in violation of the constitutional rights of this petitioner, as evidence against him in said cause.

That the said property was unlawfully seized, as aforesaid, in violation of Article IV of the Constitution of the United States, commonly known as the Bill of Rights, guaranteeing citizens of the United States against unreasonable searches and seizures, and the same is proposed and intended to be used, as petitioner is informed and believes, to, in effect, compel this petitioner to be a witness against himself, as aforesaid, in violation of the Fifth Amendment to the Constitution of the United States, providing that no person shall be compelled in a criminal case to be a witness against himself.

That unless the Court shall order that the said persons and officers, or persons now having said property in their possession, shall restore the same from whence it was so unlawfully taken, and order that the same officers and agents of the United States Government refrain from using the said property, or any information obtained by them

through said unlawful search and seizure, against this [9] petitioner, the constitutional rights of this petitioner have and will be violated as aforesaid.

WHEREFORE, your petitioner prays that the United States District Attorney, United States Marshal, Clerk of this Court, and all of said officers and persons who participated in said unlawful search and seizure or have now in their possession any of said property or knowledge gained from said unlawful search or seizure, be forever restrained from using the same or any part or parcel thereof in any manner against this petitioner in this cause, and that said officers and persons now having said property in their possession be ordered and directed to restore and replace the same at the place and condition from whence same was so unlawfully seized and taken.

DAVID B. DRISKILL,
Petitioner.

State of Arizona,
County of Maricopa,—ss.

David B. Driskill, being first duly sworn, on his oath deposes and says, that he is the petitioner above named; that he has read the foregoing petition by him subscribed and that the same is true in substance and in fact of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those, he believes it to be true.

DAVID B. DRISKILL.

Subscribed and sworn to before me this twenty-fourth day of October, 1921.

[Seal] SPENCER B. PUGH,
Notary Public.

My commission expires 10/30/22. [10]

[Endorsements]: No. C–1323. United States Court, District of Arizona. U. S. of America vs. David B. Driskill, Defendant. Motion to Restore Property and for Restraining Order. Filed Oct. 24, 1921. C. R. McFall, Clerk. By P. D. Madden, Deputy.

Copy rec'd this 24 day of October, 1921.

THOMAS A. FLYNN,
By J. M. Holub. [11]

In the District Court of the United States in and for the District of Arizona.

PHOENIX—1323–C.

UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Motion to Strike Petition for Restoration of Property.

Comes now the United States of America, plaintiff, herein, by Thomas A. Flynn, United States Attorney for the District of Arizona, and moves the Court to strike defendant's petition for restora-

tion of property from the files herein, and for grounds of said motion, says:

I.

That the said petition as appears upon its face fails to disclose sufficient reason for the granting of the relief prayed therein.

II.

That said petition fails to disclose that the petitioner is the owner of, or claims any interest in, the property which he seeks in said petition to have restored to him.

III.

That the said petition shows upon its face that the barn, storehouse or garage from which it is alleged said property was taken by the officers was not upon or a part of the premises of which the defendant has exclusive possession.

IV.

That it appears from said petition that the said barn, storehouse and garage was located upon premises which defendant had rented to a tenant and which said barn, storehouse and garage were continuously accessible to and used by said tenants as an outbuilding and storehouse.

THOMAS A. FLYNN,
United States Attorney for the District of Arizona.

[12]

[Endorsements]: No. Phoenix 1323-C. In the District Court of the United States for the District of Arizona. United States of America vs. David B. Driskill, Defendant. Motion to Strike Petition for

Restoration of Property. Filed October 27, 1921. C. R. McFall, Clerk. By P. D. Madden, Deputy. Thomas A. Flynn, United States Attorney. [13]

In the District Court of the United States in and for the District of Arizona.

PHOENIX—1323–C.

UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Answer of Petition for Restoration of Property and for Restraining Order.

COMES NOW the United States of America, by Thomas A. Flynn, United States Attorney for the District of Arizona, and answering the statements and allegations contained in the petition for restoration of property and for restraining order, heretofore filed by the defendant in this cause, admits, alleges and denies, as follows, to wit:

Admits that the petitioner is a citizen of the United States and of the State of Arizona; that on or about the 23d day of April, 1921, the petitioner and his family were the owners of and in the exclusive possession of a certain dwelling-house and outbuilding, chicken-house, and other buildings and yards, same being and constituting a frontage of 150 feet on West Washington Street, Phoenix, Arizona, and running back a distance of about 165 feet

to an alley, said dwelling-house being occupied at said time by petitioner and his family as a home and dwelling-house, and said other parts of said premises being upon said property and accessory thereto and a part of the home and premises of the petitioner, said house being numbered as No. 2248 West Washington Street, in said Phoenix, Arizona, and that at the said time the petitioner and his family were also the owners of certain other premises in the rear of the north of said above-described property, consisting of a dwelling-house and other outbuildings, including a barn, storehouse and garage immediately adjoining the premises hereinbefore first described.

Denies that the said dwelling-house and other outbuildings, to wit, garage last above described were occupied and used jointly by and between petitioner and a tenant to whom he had rented the dwelling-house on said adjoining premises; denies that the said garage last above described was the family storehouse of the defendant or his family; and alleges the facts to be that the [14] said dwelling and garage last above described were by the defendant rented, at a stipulated monthly rental, to W. H. Luttner, and Mrs. W. H. Luttner, and were then and there occupied by the said Luttner and wife as their home; and that said dwelling-house and garage were then and there under the exclusive control of the said Luttner and wife as tenants.

Denies that on or about the said date, certain persons and officers, including one E. B. Sisk, a

special agent of the Department of Justice of the United States, one Daniel J. Lucey, a police officer of the City of Phoenix, one Fred Weage, Assistant United States Marshal, and others under their charge and direction, unlawfully and without warrant or authority so to do, and without any search-warrant or any warrant whatsoever for said premises, as required by law, entered the above-mentioned dwelling and garage of petitioner on his premises, over the protest of the petitioner; and allege the facts to be that the above-mentioned officers did search the garage or storeroom on the premises so rented by the said Luttners from the said Driskill, as aforesaid, with the full consent and permission of the occupant of the premises, to wit, Mrs. W. H. Luttner, who was then and there in charge of said premises and the above-mentioned garage or storeroom, and further alleges that the said E. B. Sisk, with the aid of other officers, did find in and remove from the above-mentioned garage seven pints of whiskey, nine pints of tequila and one gallon of other intoxicating liquors, and other liquors, together with receptacles in which same were contained, a certain trunk and other property, particularly empty whiskey flasks.

Denies that the said acts of said E. B. Sisk and other officers in aid of said E. B. Sisk were in violation of the 4th and 5th Amendments to the Constitution of the United States.

Admits that the said property so seized is now held by J. P. Dillon, United States Marshal for the District of Arizona, and that the same is intended

to be used by the United States Attorney as evidence in the trial of the defendant in the above-entitled cause. [15]

Denies that the said property was unlawfully seized in violation of Article IV of the Constitution of the United States or in violation of any article of the Constitution of the United States. And denies that the same in proposed and intended to be used in effect or otherwise to compel the said petitioner to be a witness against himself. Denies that the use of the said property as evidence is in violation of the 5th or any Amendment to the Constitution of the United States.

WHEREFORE, the said United States Attorney, having fully answered said petition, prays the Court to deny the petition of the defendant for restoration of property and restraining order by him filed in this cause.

THOMAS A. FLYNN,
United States Attorney for the District of Arizona.

United States of America,
District of Arizona,—ss.

E. B. Sisk, being first duly sworn, on his oath deposes and says that he has read the above and foregoing answer to the petition for restoration of property and for restraining order, and knows the contents of said petition and answer; that the allegations in said petition which are denied in said answer are untrue; that all the matters and things alleged in said answer are true of his own knowledge, except the matters and things stated therein

upon information and belief, and as to those matters he believes them to be true.

[Seal] E. B. SISK.

Subscribed and sworn to before me this the 26th day of October, A. D. 1921.

PATRICK D. MADDEN,

[16]

Deputy Clerk of the United States District Court.

[Endorsements]: Phoenix—No. 1323—C. In the District Court of the United States for the District of Arizona. United States of America vs. David B. Driskill. Answer to Petition for Restoration of Property and for Restraining Order. Filed October 27, 1921. C. R. McFall, Clerk. By P. D. Madden, Deputy. Thomas A. Flynn, United States Attorney [17]

C–1323—PHOENIX.

UNITED STATES OF AMERICA,

Plaintiff,

against

DAVID B DRISKILL,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant is guilty of the first count, the defendant not guilty of the second count of said indictment.

W. L. JAMES,

Foreman.

[Endorsements]: No. C–1323—Phoenix. United States District Court, District of Arizona. U. S. A., Plaintiff, vs. David B. Driskill, Defendant. Verdict. Filed Oct. 29, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [18]

UNITED STATES OF AMERICA.

In the District Court of the United States for the District of Arizona.

At the October Term, 1921, held at Phoenix, Arizona, in said District, on November 2d, 1921. Honorable JEREMIAH NETERER, District Judge, Specially Assigned, Presiding.

Case No. C–1323 (PHOENIX.)

UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Judgment and Commitment.

The defendant, David B. Driskill, is present in person, and with his counsel, Spencer B. Pugh, Esquire.

The United States Attorney for the District of Arizona is present on behalf of the United States. And this being the time heretofore fixed for passing Judgment on the defendant aforesaid, the said defendant is now duly informed by the Court of the nature of the indictment found against him for the

crime of Violating Section 3 of Title 2 of the Act of October 28, 1919,—possessing intoxicating liquor, —of his arraignment at the bar of this court on said indictment; of his plea of not guilty on said arraignment, and of his trial before a jury of twelve men, and of the verdict of GUILTY of the first count of the said indictment; and not guilty of the second count.

The said defendant is now asked if he has any legal cause to show why judgment should not be pronounced against him; and no sufficient cause being shown or appearing to the Court, the Court renders its Judgment as follows:

That, whereas you, David B. Driskill, having been duly convicted in this Court of the crime aforesaid, it is found by the Court that you are so guilty of said crime.

It is therefore ORDERED, ADJUDGED AND DECREED, and the Judgment and Sentence of the Court is that as a punishment for the said offense you shall pay a fine of Five Hundred Dollars and costs amounting to the sum of Ninety-Four Dollars, and in default of the payment of the said fine you shall stand committed.

The said defendant is now remanded to the custody of the United States Marshal for said District, to be by him delivered into the custody of the proper officer of said ———

And it is further ORDERED, that a certified copy of this Judgment shall be sufficient Warrant for the said Marshal to take, keep and safely deliver the said defendant into the custody of the proper of-

ficers of said ———, and a sufficient Warrant for the officers of said ——— to keep and imprison the said ———.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify the foregoing to be a true and correct copy of the Judgment made and entered on the minutes of said District Court in the above-entitled action, and of the whole thereof.

Attest: My hand and seal of said Court, this 5th day of November, A. D. 1921.

[Seal] C. R. McFALL,
Clerk.
By Clyde C. Downing,
Chief Deputy Clerk. [19]

In the District Court of the United States in and for the District of Arizona.

No. 1323.

UNITED STATES OF AMERICA
vs.
DAVID B. DRISKILL,
Defendant.

Motion for New Trial.

Now comes David B. Driskill, defendant in the above-entitled cause, by his attorney, and moves the Court to set aside the verdict rendered herein

and to grant a new trial, upon the following grounds, to wit:

I.

The verdict is contrary to the law of the case.

II.

The verdict is not supported by the evidence in the case.

III.

The Court upon the trial of the case admitted evidence offered by the United States, which said evidence was incompetent.

IV.

The Court erred in refusing to direct a verdict of not guilty at the close of the Government's case.

V.

The Court erred in refusing to direct a verdict of not guilty at the close of all the evidence.

SPENCER B. PUGH,
Attorney for Defendant. [20]

[Endorsements]: No. 1323. In the United States District Court in and for the State of Arizona. United States of America vs. David B. Driskill, Defendant. Motion for New Trial. Filed Nov. 2d, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. Spencer B. Pugh, Attorney for Defendant. [21]

Regular October Term, 1921—Wednesday, November 2, 1921—Phoenix.

At a regular term, to wit, the October Term, 1921, of the United States District Court for the District of Arizona, held in the courtroom of the said Court in the Postoffice Building in the City of Phoenix, State and District of Arizona, on Wednesday, the 2d day of November, A. D. 1921, at the hour of 9:30 o'clock A. M. Honorable JEREMIAH NETERER, United States District Judge for the Western District of Washington (Specially Assigned), Presiding. Present: JOSEPH P. DILLON, United States Marshal; THOMAS A. FLYNN, United States Attorney; JOHN H. LANGSTON, Assistant United States Attorney; JOHN H. MARTIN, Assistant United States Attorney; JOSEPH M. HOLUB, Assistant United States Attorney; CLYDE C. DOWNING, Chief Deputy Clerk; GEORGE H. BLANCHARD, Bailiff; OSCAR F. TEMPLE, Bailiff; FRANCIS NOLAN, Crier.

Court is duly opened by the United States Marshal according to law.

Excerpt from Minutes.

* * * * * * * *

No. C-1323 (PHOENIX).

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID B. DRISKILL,

Defendant.

Minutes of Court—November 2, 1921—Order Denying Motion for New Trial.

The United States Attorney for the District of Arizona appearing on behalf of the Government; Spencer B. Pugh, Esquire, appearing for and on behalf of the defendant,—

IT IS ORDERED, upon motion for a new trial having been fully argued and considered, that the said motion be and the same is hereby denied. [22]

In the District Court of the United States for the District of Arizona.

PHOENIX—1323-C

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID B. DRISKILL,

Defendant.

Bill of Exceptions No. 1.

BE IT REMEMBERED, that on the 28th day of October, 1921, at a term of the court held in Phoenix, Arizona, in and for the District of Arizona, before his Honor, Jeremiah C. Neterer, District Judge, presiding, the issues being joined in the above-stated cause between the United States of America, as plaintiff, and David B. Driskill, as defendant, came on to be tried before the said Judge and a jury, and the United States of America ap-

pearing by Mr. J. H. Langston, Assistant United States Attorney, and the said defendant appearing in person and by Spencer B. Pugh, as his attorney;

And the defendant having theretofore filed in said cause his petition for restoration of property, and for a restraining order, in words and figures as follows, to wit:

"In the District Court of the United States, in and for the District of Arizona.

No. 1323–C.

UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Petition for Restoration of Property and Restraining Order.

To the Honorable District Court of the United States in and for the State of Arizona: [23]

Now comes David B. Driskill, the defendant in the above-entitled cause, petitioning the Court, and says that he is a citizen of the United States and of the State of Arizona; that on or about the 23d day of April, 1921, your petitioner and his family were the owners of and in the exclusive possession of a certain dwelling-house and outbuildings, chicken-house, and other buildings and yards, same being and constituting a frontage of 150 feet on West Washington Street, Phoenix, Arizona, and running back a distance of about 165 feet to an

alley, said dwelling-house being occupied at said time by petitioner and his family as a home and dwelling-house, and said other parts of said premises being upon said property and accessory thereto and a part of the home and premises of your petitioner, said house being numbered as No. 2248 West Washington Street, in said city; that at said time your petitioner and his family, of which he is the head, were the owners of certain other premises in the rear of the north of said above-described property, consisting of a dwelling-house and other out buildings, including a barn, storehouse and garage immediately adjoining the premises hereinbefore first described and which said barn, storehouse and garage was occupied and used jointly by and between petitioner and a tenant to whom he had rented the dwelling-house on said adjoining premises, said storehouse being used by and accessible alike by said tenants as a storehouse and by the petitioner and his family, same being the barn and family storehouse used at said time by the petitioner and used in connection with his dwelling and upon his own land and premises and that of his wife and family, and same constituting their homestead, as well as being continuously accessible by and used by said tenants, as an outbuilding and storehouse, jointly with your petitioner.

That on or about said date certain persons and officers, including one Mr. Sisk, special agent of the Department of Justice [24] of the United States, one Daniel J. Lucy, a police officer of the City of Phoenix, one Fred Weage, Assistant United

States Marshal, and others under their charge and direction, unlawfully and without warrant or authority so to do, and without any search-warrant or any warrant whatsoever for said premises, as required by law, entered the aforesaid premises, dwelling-house, garage, barn and storeroom of petitioner on his premises, hereinbefore described, over the protest and without the consent of this petitioner, or any other occupant thereof or person thereon or having authority therein or thereabout, and took, carried away and removed from the said premises, to wit, the said barn and storeroom in connection with the same premises and the dwelling-house of petitioner, as petitioner is informed and believes, the following described property, to wit: Seven pints of whiskey, nine pints of tequila and one gallon of other intoxicating liquor, and other liquors, together with receptacles in which same were contained, and other property, the nature of which is unknown to your petitioner.

That the acts aforesaid of said officers was in violation of the 4th and 5th Amendments to the Constitution of the United States, and that the said property so unlawfully seized is now held by the United States Marshal, J. P. Dillon, and by the office of the United States District Attorney and United States Clerk, District of Arizona, as petitioner is informed and verily believes, as evidence against the petitioner as defendant in the above-entitled cause, and that the said officers of the Government propose, intend and are threatening to and about to use the same property, so unlawfully seized

in violation of the Constitutional rights of this petitioner, as evidence against him in said cause.

That the said property was unlawfully seized, as aforesaid, in violation of Article IV of the Constitution of the United States, commonly known as the Bill of Rights, guaranteeing citizens [25] of the United States against unreasonable searches and seizures, and the same is proposed and intended to be used, as petitioner is informed and believes, to, in effect, compel this petitioner to be a witness against himself, as aforesaid, in violation of the Fifth Amendment to the Constitution of the United States, providing that no person shall be compelled in a criminal case to be a witness against himself.

That unless the Court shall order that the said persons and officers, or persons now having said property in their possession, shall restore the same from whence it was so unlawfully taken, and order that the same officers and agents of the United States Government refrain from using the said property, or any information obtained by them through said unlawful search and seizure, against this petitioner, the constitutional rights of this petitioner have and will be violated as aforesaid.

WHEREFORE, your petitioner prays that the United States District Attorney, United States Marshal, Clerk of this Court, and all of said officers and persons who participated in said unlawful search and seizure or have now in their possession any of said property or knowledge gained from said unlawful search and seizure, be forever restrained from using the same or any part or parcel thereof

in any manner against this petitioner in this cause, and that said officers and persons now having said property in their possession be ordered and directed to restore and replace the same at the place and condition from whence same was so unlawfully seized and taken.

(Signed) DAVID B. DRISKILL,
Petitioner.

State of Arizona,
County of Maricopa,—ss.

David B. Driskill, being first duly sworn, on his oath, deposes and says that he is the petitioner above named; that he [26] has read the foregoing petition by him subscribed and that the same is true in substance and in fact of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those, he believes it to be true.

(Signed) DAVID B. DRISKILL.

Subscribed and sworn to before me this twenty-fourth day of October, 1921.

(Signed) ————————————,
Notary Public.

My commission expires ————."

AND, the United States of America, having filed its answer to said petition in words and figures as follows, to wit:

"In the District Court of the United States, in and for the District of Arizona.

PHOENIX—1323–C.

UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Answer to Petition for Restoration of Property and for Restraining Order.

COMES NOW the United States of America, by Thomas A. Flynn, United States Attorney for the District of Arizona, and answering the statements and allegations contained in the petition for restoration of property and for restraining order, heretofore filed by the defendant in this cause, admits, alleges and denies as follows, to wit:

Admits that the petitioner is a citizen of the United States and of the State of Arizona; that on or about the 23d day of April, 1921, the petitioner and his family were the owners of and in the exclusive possession of a certain dwelling-house and outbuilding, chicken-house and other buildings and yards, same being and constituting a frontage of 150 feet on West Washington [27] Street, Phoenix, Arizona, and running back a distance of about 165 feet to an alley, said dwelling-house being occupied at said time by petitioner and his family as a home and dwelling-house, and said other parts of said premises being upon said property and acces-

sory thereto and a part of the home and premises of the petitioner, said house being numbered as No. 2248 West Washington Street in said Phoenix, Arizona, and that at the said time the petitioner and his family were also the owners of certain other premises in the rear of the north of said above-described property, consisting of a dwelling-house and other outbuildings, including a barn, storehouse and garage immediately adjoining the premises hereinbefore first described.

Denies that the said dwelling-house and other outbuildings, to wit, garage last above described were occupied and used jointly by and between petitioner and a tenant to whom he had rented the dwelling-house on said adjoining premises; denies that the said garage last above described was the family storehouse of the defendant or his family; and alleges the facts to be that the said dwelling and garage last above described were by the defendant rented at a stipulated monthly rental to W. H. Luttner and Mrs. W. H. Luttner, and were then and there occupied by the said Luttner and wife as their home; and that said dwelling-house and garage were then and there under the exclusive control of the said Luttner and wife as tenants.

Denies that on or about the said date, certain persons and officers, including one E. B. Sisk, a special agent of the Department of Justice of the United States, one Daniel J. Lucey, a police officer of the City of Phoenix, one Fred Weage, Assistant United States Marshal, and others under their charge and direction, unlawfully and without war-

rant or authority so to do, and without any search-warrant or any warrant whatsoever for said premises, as required by law, entered the above-mentioned dwelling and [28] garage of petitioner on his premises, over the protest of the petitioner; and allege the facts to be that the above-mentioned officers did search the garage and storeroom on the premises so rented by the said Luttners from the said Driskill, as aforesaid, with the full consent and permission of the occupant of the premises, to wit, Mrs. W. H. Luttner, who was then and there in charge of said premises and the above-mentioned garage or storeroom, and further alleges that the said E. B. Sisk, with the aid of other officers, did find in and remove from the above-mentioned garage seven pints of whiskey, nine pints of tequila and one gallon of other intoxicating liquors, and other liquors, together with receptacles in which same were contained, a certain trunk and other property, particularly empty whiskey flasks.

Denies that the said acts of said E. B. Sisk and other officers in aid of said E. B. Sisk were in violation of the 4th and 5th Amendments to the Constitution of the United States.

Admits that the said property so seized is now held by J. P. Dillon, United States Marshal for the District of Arizona, and that the same is intended to be used by the United States Attorney as evidence in the trial of the defendant in the above-entitled cause.

Denies that the said property was unlawfully seized in violation of Article IV of the Constitution of the United States or in violation of any

article of the Constitution of the United States. And denies that the same is proposed and intended to be used in effect or otherwise to compel the said petitioner to be a witness against himself. Denies that the use of the said property as evidence is in violation of the 5th or any amendment of the Constitution of the United States.

WHEREFORE the said United States Attorney, having fully answered said petition, prays the Court to deny the petition of the defendant for restoration of property and restraining order [29] by him filed in this cause.

(Signed) THOMAS A. FLYNN,
United States Attorney for the District of Arizona.

United States of America,
District of Arizona,—ss.

E. B. Sisk, being first duly sworn, on his oath deposes and says that he has read the above and foregoing answer to the petition for restoration of property and for restraining order, and knows the contents of said petition and answer; that the allegations in said petition which are denied in said answer are untrue; that all the matters and things alleged in said answer are true of his own knowledge, except the matters and things stated therein upon information and belief, and as to those matters he believes them to be true.

(Signed) E. B. SISK.

Subscribed and sworn to before me this 26th day of October, A. D. 1921.

[Seal] (Signed) PATRICK D. MADDEN,
Deputy Clerk of the United States District Court.

AND, the said petition not having been ruled upon by the Court at the time of the beginning of the trial and the swearing of the jury to try said cause, but the ruling upon said petition and the answer thereto having been by the Court deferred to the trial of said cause,—

THEREUPON, the following evidence was introduced in said cause:

Testimony of E. B. Sisk, for the Government.

E. B. SISK, being sworn as a witness testified as follows:

("My name is E. B. Sisk. I am a special agent, Department of Justice, and was such during the month of April, last. I know the defendant Driskill, and know where he lived during the month [30] of April. I was at his place on April 21st. Special Agent Wilkey, of the Department of Justice, Police Officer D. J. Lucey were in my car, and another car accompanying us had in it that day Deputy United States Marshal Fred Weage, Police Inspector J. J. McGrath, and Police Officer Joe Balz.

Q. And just tell what you did when you went down to his house.

Mr. PUGH.—Now, I object, if the Court pleases, unless it is shown that there was a search-warrant for what they did there, the question is a broad one, and might involve something, or bring to the attention of this Court something for which there was no search-warrant.

The COURT.—Answer the question.

(Testimony of E. B. Sisk.)

A. Approaching the block—

The COURT.—Not what you did when you were approaching the house; when you got to the house, we will find out.

A. Approaching the block we drove into—I drove into the alley which would lead me to the rear of the house, of the defendant's house, and driving up the alley directly to the rear of his house, I stopped at his, at the back end of his garage, which opens on to the alley. As I stopped I saw the defendant. As I stopped at the back of his premises, I noticed the doors of his garage open, and also the doors open of the garage across the alley and north of his premises.

Mr. PUGH.—Now, if the Court pleases, I move to strike out the use of the words "his premises," unless it is shown that this witness knows those premises.

The COURT.—Motion denied, let the answer stand for now.

The WITNESS.—(Continuing answer.) When I first looked into the garage as I came to a stop in the car, I looked across into the garage across the alley from the defendant's premises, and the defendant was stooping, had hold of a trunk, and in the act [31] of pushing it back into a corner. He arose and walked out of the garage across the alley and started into the garage on his premises. I told him that Fred Weage—I asked him first if this was his place over there, and this was—I asked him if the place he came out of was his premises,

(Testimony of E. B. Sisk.)

or the place he started into, my understanding being that the place to my left—he said, "This is mine over here." I said, "What are you doing over here," pointing to the garage he came out of, and he said, "Putting some things over there." I said to him then, "Fred Weage has a search-warrant at the front of the house, and wants to see you." He said, "All right, I will go up," and he did go in that direction toward his own house, to which place the deputy marshal had driven. I learned afterward that the number of the house was 2248 West Washington Street. As he passed through his garage leaving me standing in the alley, I went in to see what these things were, I went into the garage he came out of across the alley from his premises to see what was the character of these things he said he was putting in there. I found that—

Mr. PUGH.—I object to what he found there.

The COURT.—Sustain the objection at this time.

A. I next went into the garage that he had come out of. That was the garage he said was not his, across the alley from the premises which he said were his. This was the garage in the back of a different house, across the alley, and in the rear of his house—in the rear of a house that fronted on Twenty-third Street. Mr. and Mrs. Luttner lived in that house. I saw and talked with Mrs. Luttner a couple of minutes after I went there; I don't know how many of the officers were present at that time, I could not say as to which of the officers

(Testimony of E. B. Sisk.)

were present, if any. I personally called Mrs. Luttner, knocked at her door and called her out. I asked her as to the ownership and [32] possession of these premises.

Mr. PUGH.—We object to that question, if the Court pleases.

The COURT.—Sustain the objection.

The WITNESS.—A. After I talked with Mrs. Luttner, she returned to her house. I saw her afterwards on those premises. She was there continuously, I think, until we left. She was out again during the time we were there, while we were waiting for an express truck, she came out again and came into the barn. There were several of the officers at that time in the barn or garage, and the defendant was standing outside in the alley. He saw me in the barn and made no objection to my being in the barn at that time. He made no objection to us being on his premises, told us to leave his premises. He made no objection to us being in the barn across the alley. I was in there for twenty, thirty minutes, or thirty or forty minutes. During that time the defendant was in the alley, and the door of the garage, a portion of the time sitting in the car, my car. Mrs. Luttner was out in the barn a portion of the time pointing out to us property in there that didn't belong to her. She pointed out property there that belonged to some one else other than her.

Q. State whether or not there was any permission given by Mrs. Luttner for either you or any other

(Testimony of E. B. Sisk.)

officers that were there present at that time to take any of the property out of that barn?

Mr. PUGH.—I object, if the Court pleases; it would be a matter of hearsay. And the further objection, if the Court pleases, it calls for a conclusion.

The COURT.—Denied. A. Yes, sir.

Q. What property did she give you permission to remove from the barn? [33]

Mr. PUGH.—If the Court pleases, that calls for a conclusion, and it is hearsay also.

The COURT.—He may answer.

A. She pointed out a trunk she said was not hers, and a barrel she said was not hers, and asked us to remove it from her premises, just the trunk and the barrel, and what they contained. I removed the trunk and the barrel from the premises. The defendant was standing there and watching us when I removed them from the premises. He saw me move them out. While he was there watching me I put them on a truck, and then they were brought to the Federal Building.

Thereupon, the witness E. B. Sisk was withdrawn temporarily from the stand.

Testimony of Mrs. W. H. Luttner, for the Government.

Mrs. W. H. LUTTNER was called as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

Direct Examination.

My name is Mrs. W. H. Luttner and I reside at

(Testimony of Mrs. W. H. Luttner.)

2245 West Adams. I know the defendant Driskill and know where he lives. I live opposite the alley, opposite his house, across the alley. I rent those premises from Mr. Driskill. I rented them on about— it will be two years in June or July, I think, and have been living there all that time. I think I rented the premises from Mr. Driskill, or my husband; I don't remember. There are outbuildings on those premises; a garage. That was not there when we went there. It was constructed, I think, about six months after we had lived there; it might have been before that time. Mr. Driskill constructed the garage or building, and since it has been constructed I have had possession of part of it. I have used it as a store place for our furniture, and I kept jellies and different things out there. We do not keep any automobile out there, but in time we thought maybe we would get an automobile [34] and then use it as a garage. We have been occupying it as a store place since it has been constructed there. It is on the premises that I originally rented from Mr. Driskill. To my knowledge, during last April, Mr. Driskill had some property in there.

I remember an occasion of Mr. Sisk, and some other officers coming there. I do not remember the date when that was. I could not tell you approximately the date; I never gave it a thought. There were a number of officers with Mr. Sisk on that occasion. I do not remember any of their names; just remember Mr. Sisk. I don't think I

(Testimony of Mrs. W. H. Luttner.)

would remember the other names if they were mentioned; I know their faces. They were some of the witnesses that were sworn here to-day. Mr. Sisk asked me, and I gave him permission to take property out of that garage or from that building that day. He asked me whether I cared whether he moved that trunk that was out near the side, and I said no, I didn't care because it didn't belong to me, and I didn't know who it belonged to, and he could take it. He said he found a barrel with some bottles in it, and I said he could take that too, because it didn't belong to me. I don't know who they belonged to, nor do I know who put them in there. Mr. Driskill had said something to me about putting something in there. It was either on the same morning, or the morning before, he asked me whether he could put a trunk in the shed, and I said he could. He asked me whether I thought there was room enough, and I said yes, I thought there was. That was before the trunk was put in there that Mr. Driskill asked me if he could put a trunk in there. The trunk and the barrel and bottles were taken away that day. I don't know by whom. I saw the Lightning Delivery truck come up; I don't know who they were taken away by, but I think they were taken by the officers. I think I saw the truck come up, and I did not know they were taking them off; I never saw it go away. I went into [35] the house then, I think. I had some conversation with Mr. Driskill about that time about this trunk and barrel. He was arrested then.

(Testimony of Mrs. W. H. Luttner.)

He was arrested that day, and I think after he was released, why I went over there for some eggs, and he told me he had been arrested, and how it was and all that, and that was all there was to it. He said something to me about a trunk and barrel being taken out of the shed or building. He said that they had found some liquor in it. He said, 'Did you leave them take it out?' and I said, 'Yes.' He didn't say anything more about it then. He has not said anything to me since that time about my permitting the officers or allowing them to take the things out."

Cross-examination.

"At the time we rented the place, I knew of the arrangement. It was understood that he was to use that garage with us when he put it up. He put it up a few days later, and then he told us we could use the garage with him. He has been using a part of the garage since that time at all times for storage room, and he was in and out there every day, and every short time some of his folks were storing stuff back there, and had access to it just the same as we did. There was no particular division in the storehouse named as to which part was to be used by my family; it was just wherever there was room. Each one of us were to use it generally for anything we wanted to put in so long as it would hold it. At the time I rented the place, there was no storehouse or garage there. Since that was built, that is the only out-storehouse used at all on the premises of Mr. Driskill, that

(Testimony of Mrs. W. H. Luttner.)

is, not counting the garage in which he keeps the car. It is located directly across the alley from the end of the driveway into Mr. Driskill's premises. We used this storehouse or garage or barn all the time as a passageway through from one house to the other because we had no rear gate, except through that building. [36]

When I first saw Mr. Sisk there, there were about five officers with him. They were all back there in that alley. I don't know whether they had already been through Mr. Driskill's house or not. At that time they had Mr. Driskill in charge of two or three of the officers in their car some distance east of this entrance to this barn or garage, so that Mr. Driskill was not there at the time that this conversation was had between myself and Mr. Sisk.

Redirect Examination.

I do not know where the defendant was at the time I gave permission to the officers to take the trunk and the barrel out of the premises. At the time they took them out, I think he was out in the automobile. I happened to look over the fence, and I wanted to see where his wife was, and I think I saw him in the machine with the officers or somebody with him. The machine was about twelve feet from his shed. It was about the same distance away with reference to the shed on my premises. It was not between the two sheds; it was away from his shed, twelve feet away from his shed; it was where he had a garden, and I saw the machine standing there. Our shed is right opposite his shed, and it

(Testimony of Mrs. W. H. Luttner.)

was about the same distance from his garage on his premises across the alley from mine as it was from mine.

It was understood between my husband, Mr. Driskill and I, that he was to use that house for a storehouse. I was there a few days later when they talked about it together. That was at a time when the garage was built. I don't remember how long that was before this trunk and barrel were put in there, or the date that I gave Mr. Driskill permission that they might put them in there. That was approximately when the shed was built, about three months after we lived there, or six months, some time. We have been living there about two years; it was two years in June or July, something like a year and a half before. He had kept [37] some tables and things that he was fixing in there, and they were painting his shed, as a chicken-house. He has been using that right along always, and he has lots of things in the house that he wanted to store in the shed, and he had some tables and a few picture frames and things that he stuck under the roof. The morning that Mr. Sisk was there I did not point out things to Mr. Sisk that were not mine. I pointed out those that were mine, and they asked whether there was any more of his things there. I didn't think of those things that were in the shed that were under the roof, shovels and things. He was always in and out of there, because he hadn't finished building our place."

(Testimony of Mrs. W. H. Luttner.)

Recross-examination.

At the time that this garage was built, I and my husband had no car. Mr. Driskill has two cars. As to the location of where this car was that they had Mr. Driskill in at the time of this search of the barn there, that car was some twelve feet east of Mr. Driskill's main garage over on his side of the alley. The end of that is probably ten or twelve feet east beyond from the entrance to this part of the garage or barn. At the time I got there and those officers were there, I don't remember how many doors of the garage they had open. The trunk was in about the center of the shed. It would be possible from where Mr. Driskill was to see into the garage at that part of it, he could not have seen the trunk, because he was in the alley, in the middle. He was in the alley in that automobile. He could not possibly have seen in there from that position."

Redirect Examination.

I don't remember whether he was still there in the automobile when the trunk and barrel were taken out and placed on the truck and hauled away. The place where the automobile was, was not in plain view of the door where the trunk and barrel were taken out; it was away from the shed; it was east of the shed. [38] It was facing west. I think it was facing towards the shed; I don't remember. I don't remember whether there was any obstruction between the door and the car where the things were taken out; I don't know, that is, the car where Mr.

(Testimony of Mrs. W. H. Luttner.)

Driskill was and the door where the things were taken out. The trunk was in the shed and he was out of the shed in the machine. I don't know whether the trunk and barrel could have been seen from the machine where Mr. Driskill was sitting when they were taken out of the shed and placed on the truck. I suppose it was in plain view; I don't know. I know where the machine was standing and I know where the door was they were taking the things out of. I think, but I don't know, whether a person sitting in that machine could see that door and these things taken out through the door."

Recross-examination.

That was not Mr. Driskill's car that he was in. It was an officer's car. I think there were two or three officers sitting in there with him in the car; there were some men in there. I was nervous and didn't pay much attention to it. I saw Mr. Sisk when he first came up there. There were a number of other officers with him at the time when he first came. I don't know whether Mr. Driskill was there at that time. They were talking and walking back and forth, and I didn't pay much attention to them. I don't remember seeing Mr. Driskill around there when they took the trunk away, I don't know whether they had already gone with Mr. Driskill, I think he was in the automobile. I don't know whether he had gone yet or not."

Thereupon the witness was excused.

Testimony of E. B. Sisk, for the Government. (Recalled).

E. B. SISK was recalled, and having been theretofore sworn, testified further as follows:

Direct Examination (Continued).

On the occasion of my being at the garage or barn or shed [39] upon the Luttner premises that I have just testified to a few moments ago, I took a trunk out of the shed.

Mr. PUGH.—Now, I object, if the Court pleases, the evidence already showing that this was upon the premises occupied by the defendant, and we object to any showing of anything seen or taken out or anything done there, until it is shown it was done in a proper legal way.

The COURT.—He may state what he took out, not the contents.

The WITNESS.—I took out one trunk and one barrel.

Mr. LANGSTON.—Q. And what was in the trunk, and what was in the barrel, if you know?

Mr. PUGH.—Object, if the Court pleases.

The COURT.—Was there anything in the trunk and barrel?

Mr. LANGSTON.—Q. What was in the barrel and what was in the trunk?

Mr. PUGH.—We object upon the same grounds, if the Court pleases.

The COURT.—Is there any other testimony at present upon this phase of the matter?

(Testimony of W. H. Luttner.)

Mr. PUGH.—There is if the state has closed.

Mr. LANGSTON.—I think not on behalf of the Government, your Honor.

The COURT.—Do you want to present your testimony, now?

Mr. PUGH.—We are ready.

Thereupon the witness was excused temporarily.

Testimony of W. H. Luttner, for the Defendant.

W. H. LUTTNER was called as a witness by the defendant, and having been first duly sworn, testified as follows:

Direct Examination.

"My name is W. H. Luttner. I live at 2245 West Adams. I rent the house there where I am living from D. B. Driskill. I rented it about June the first, 1920. I have been living there [40] during the time since that. At the time I rented the premises there was not any garage or shed in the back part of that lot adjoining the regular garage or hen-house of Mr. Driskill. I pay Mr. Driskill thirty-five dollars rent. About sixty or seventy days after the making of the lease the garage was erected. At the time I leased the place there was no contract at that time that I was to have a garage or a shed erected upon there for me. The possession of that shed, barn or garage, erected there, since the time it was put up and especially along about March and April of 1921, has been a sort of joint possession. I had some excess stuff around my house; didn't know where to put it, and

(Testimony of W. H. Luttner.)

had it covered up temporarily in the yard and afterwards Mr. Driskill agreed to build a permanent shed there of some kind and let me use a part of it. That is, he made me a proposition that he was to use part, and I was to use part. Since that time, and especially along during March and April of 1921, Mr. Driskill has used it for the storage of tools and furniture, and odd pieces of furniture and boxes and so forth. Mr. Driskill has had access to it at all times. It sets right on the alley; it backs right against his premises. It is used customarily also as a passageway between the two places. The possession and use of that is common between my family and the family of Mr. Driskill.

Cross-examination.

At present I am engaged in maintenance work at the High School. I do maintenance work, motors, taking care of the motors and repairing, and keeping the place in order. I am a mechanic, I had this garage so built there by arrangement between myself and Driskill, that I had some excess stuff around there and had no place to put it. It was built there for storage room; I had no automobile. I desired to put in whatever I had, anything that I had to store. Can't say exactly, but I believe I am right in saying that Mr. Driskill put some in there immediately after [41] it was built. The first thing I believed he stored in there was some feed boxes, if I remember right, chicken feed. That was a day or so, two or three days, maybe, after it was built. He put tools in there, probably, I

(Testimony of W. H. Luttner.)

didn't pay much attention as to what he put in there; it was none of my business. He would not tell me from time to time what he was going to put in there or make any suggestion. There were no locks kept on the doors. We might close them, not lock them. He used the building as a passage-way from my premises out into the alley through the doors.

Redirect Examination.

He was using his garage as a sort of a breeding-house, I might say, or for chickens in general, and he used this as a place where he kept the feed for them. They came in there quite often in getting feed for and in feeding the chickens, just across the alley.

Recross-examination.

Other people stored furniture and things in there too, one other person, John Houston. He has no permanent residence that I know of; he is moving around the country. He has several trunks in there, and a table and a barrel or two, and some paper boxes, by my permission. He said he would pay me rent, one dollar a month for storage, if I would take care of the stuff for him. I don't remember exactly how long I did take care of the stuff for him, some time since last spring, and it is still there.

Redirect Examination.

Prior to making the arrangement with Mr. Houston, I don't recall having talked to Mr. Driskill about it."

Thereupon the witness was excused.

Testimony of D. B. Driskill, in His Own Behalf.

D. B. DRISKILL was called as a witness in his own behalf, and being first duly sworn, testified as follows: [42]

Direct Examination.

My name is D. B. Driskill. I am the defendant in this case.

Mr. PUGH.—I take it it will be understood by counsel that in putting the defendant upon the stand before the state closes is on the particular issue now before the Court.

The COURT.—Proceed.

A. I live at 2248 West Washington Street. I am not sure whether my premises extend back north from the street on which my house faces a hundred and fifty or a hundred and sixty-five feet. They run north and south. The place I live in is a brick cottage. I have two chicken-houses, one garage, and on the property right behind, right across the alley, I have a dwelling-house and a garage and a storehouse. The property, the house back on the other street, on the other property has been rented by me to Mr. W. H. Luttner. There was no storehouse or garage on that at the time it was rented. I built the present barn and storehouse or garage with my own labor for a storeroom for myself and tenant. From the time I built it, we have got a little furniture out there to our place; in fact, we have enough furniture for two people, and I have been raising chickens, had four or five hundred

(Testimony of D. B. Driskill.)

chickens out there, and the big garage I wasn't using for a garage I used for incubating, for an incubating place, and hatching, and raising little baby chickens. At the time I put this house in the rear up, and I didn't have enough room in there to keep my other things and feed, and everything, and so I built this; Luttner had some furniture and he had moved in here from St. Louis, and he had been living in a larger house, and this house he lives in now is simply a three-room house, and he had some of his furniture out in the corner of the yard under a canvas, and I thought that it would be a good thing for him and for me both if I would build this garage. He didn't have a car at that time, and I said, "Well, I will put up this garage and we will both use it, and some time [43] I may have in the future, if I don't need it, why it will be—" I had the distinct understanding with Mr. Luttner that I would put this garage up and we would both use it. I built them a little shed on the west side to use as a washroom, to wash their clothes, and keep their washing-machine in, and so forth, and they did most of their work out there, so that the agreement was that we were both to use this shed without any specific corners, or there wasn't no specific arrangements as to what we would put in there, or put anything in there that didn't interfere with the other fellow, so we had some tables, I had two or three; we had one table, had a trunk of clothes in there, and I kept mine, some of our winter clothes in there in the summer-time, and in the

(Testimony of D. B. Driskill.)

summer-time we put our clothes that we wasn't using in there, and just soon after it was built, at that time, why we had these chickens, and I had to put all of my chicken feed over there, or leave it out and let it rain on it, so I used it mostly at that time for chicken feed, and other times along whatever we didn't have any place to store, why we took it over there and put it there. So, not so long ago he came to me and said he had a friend by the name of John Houston that wanted to store something in there. John was going to Los Angeles, and that they was figuring on coming back here, and wanted to know if he could take care of this stuff temporarily, and he had some wireless proposition that he didn't want to trust down here in the public warehouse, and Mr. Luttner had been helping John put up this aerial out there at my father-in-law's place, and so he brought this stuff over, and I said, "Yes, that is all right with me"; I said, "I don't suppose it will make any difference," and he piled it up there in the corner of the garage, and it is up there now.

I had access to the place, and Mr. Luttner had access, and most anybody else could get in there at any time; there wasn't any lock on the door. There was no lock on the door between [44] that and the alley. I think Mr. Luttner has a little lock on the front door up towards the house that he lives in, that he used to keep the kids from coming in there, to keep them from bothering his tools, and has three or four children there.

(Testimony of D. B. Driskill.)

That building is within fifteen feet of the garage across the alley next to my house that I was using for incubator purposes. The corner of that building is practically the corner of that is right opposite the corner of my garage; it is sixteen feet further west than my other place. The means of access from the premises on which my house or residence is located and over to Mr. Luttner's place is through my back garage. There is no other means of going through without you go around, come around the alley and climb over the fence. I recollect the time of Mr. Sisk and those other gentlemen coming there. That morning I was over at Mrs. Luttner's fixing or about to fix some lattice work on top of the grapevine proposition, or sort of a pergola, we call it, and as I was getting back, as I was coming back to get a hammer and some tools, I had been over there measuring how much lumber I needed for this particular purpose, and as I was coming back, why my wife was calling me, and I walked out through this garage, and as I came out of the door, Mr. Sisk and those officers that he stated had stopped in a Ford car, fifteen to twenty feet east of the east entrance of my garage, which would mean a distance of thirty-five feet, well, from thirty to forty feet, to be exact, from the end of their car, the front of their Ford car, it was a Ford, I think it was, to the garage entrance. Both doors of the garage were open; it is a double door garage, and the door that swung back to the east obstructed Mr. Sisk's or my view, or anybody else's view from seeing in

(Testimony of D. B. Driskill.)

that garage from where that car was sitting. I would be glad to take anybody out there and show them, and it would be utterly, physically impossible for Mr. Sisk to see me or anyone else to handle, take or carry away, or move, anything in [45] that garage from the place that he claimed that he saw me take hold of a trunk and move it around. After they stopped Mr. Sisk says, "What are you doing over—" No, he says, "Where is Driskill?" —they didn't seem to know me—and I said, "I am Driskill," and he said, "Where does Driskill live?" and I says, "Right over here," pointing to my brick house. My wife was calling me at the time and I went over there. And he says, "Fred Weage has a search-warrant for you," and I says, "All right." I went over to Fred Weage, and I am not sure whether Mr. Sisk went with me at that time. I went to the front of my place, went in my house, went to the front door, opened the front door, and Mr. Fred Weage and some other men, I forget who it was, maybe, I think it was Sisk, had come around at that time, and said, "We have a search-warrant for you and we are going to search you," and I said "All right, let's see you read it." Mr. Weage said, "I don't have to read it." "Well," I said, "Let me see," I says, "If you have a search-warrant, come on in." They read the search-warrant, supposed to be a search-warrant, calling for a certain number at 2216 West Washington. I told him that this was not the place, that there was nothing there, and for them to get off. They said, "We

(Testimony of D. B. Driskill.)

are going to search; it is for this place," and they went to work. Mr. Weage read the search-warrant to me there standing in my door, and the other officers coming up from the rear, and the yard was full of them, too, so I stood there, and when he read this 2216, I am not sure about the number, I have it copied there, I said, "The number you are looking for is up further on the street about the third or fourth house from here." "No, this is the place; you ain't got no numbers on this house." I said, "It don't make any difference; your search-warrant calls for that number; go search it." So he said, "You can't refuse to let me search it because your haven't got any number on the house." I had been painting the front of the house at that time, [46] and where we usually keep the numbers on the place, I had taken them off to paint under them; they wasn't out in plain view, but they was laying there. Of course, I did not know whether that was necessary or not, so I said, "Get out of my place." I was very nervous, very excited. I told them to get out of my place, and out of my property, and *and* to get clear off and stay off, and Fred Weage says, "Oh, all right; I didn't make this mistake," and Mr. Sisk was looking in reference to the number on the search-warrant, and Mr. Weage, I am not sure whether he said, "Oh, all right," or not, but something similar to it. He said "Our office didn't make this mistake." I said, "It is none of my business; get off my property," and it seemed to make Mr. Sisk very

(Testimony of D. B. Driskill.)

mad, and Fred says, "Yes, we are wrong." And one of them gave instructions for the other fellow to beat across around. I think he says, "You go out to the front and watch the front," and for somebody to come by the rear and watch the rear, kind of gave instructions that intimated that they was going back to get another search-warrant, so I says, "Get out of my place, get off my ground, get clear off the territory," and I went around at that time to the back, and there was a bunch in the back, and I went around there, and asked them to get off my territory, and while I was there going down my pathway to the garage to notify those other fellows to get off my territory, Mr. Sisk came up to me, caught me by the arm, and he says, "You bootlegging son-of-a-bitch, I will knock you in the head with this gun." My brother-in-law was present when he said that; his name is Charles L. Volt. And we were walking; I was fixing to go back to the garage; I was going back towards the garage to the entrance of this particular garage right straight back, and that is the time he caught me by the arm, and he said, he says, "You bootlegging son-of-a-bitch, I will knock you in the head with this gun." I said, "If you do in this instance, you will not knock anybody else in the head." [47]

Then he called an officer and he took and put me, I said, "Have you got a warrant for me?" He said, "No," I said, "Have you seen me do anything?" He said, "No." And about that time you (referring to Mr. Pugh) and someone else came up.

(Testimony of D. B. Driskill.)

At the time they said they had the search-warrant for me, I had stepped to the telephone for you, and I called for my brother-in-law. So when you (Mr. Pugh) came up, then Sisk had me arrested, said he didn't need no warrant, and showed me his authority here (indicating), kind of looked like a gold shield he had. I said, "Have you got a warrant?" He said, "No, I don't need no warrant; here is my authority." Then he said, he designated another officer, McGrath, and I am not sure about the other one, to take me back and put me in the car so that I could not raise any hell, and then in their presence I asked them again about the warrant, if it was possible they could come to people's homes and take people away from their homes without a warrant, or without a search-warrant, or without seeing them violate any law, and he says, "Take him and keep him in that car; put him in the Ford car." Mr. McGrath was present at the last conversation; I went in the car and sat with Mr. McGrath. They pushed me in the car, practically. I had sense enough not to resist them, because I was afraid they would knock me in the head with a gun, and I made them forcibly push me in, and not going willingly to be arrested, being on my property, and Mr. McGrath—understand, Mr. Sisk was the one, the only gentleman in the bunch that had used any rough language, or acted in a threatening manner, or anything like that. The other officers were very nice.

While I was under arrest in this car, and could not get out of the car I could not see what was going on,

(Testimony of D. B. Driskill.)

of course, and it would be hearsay except after I was sitting there possibly ten minutes, Mr. Sisk came back and said to me, "I don't see why you want to object to anybody searching your place; there is nothing [48] in there." I said, "Well, maybe I was afraid you would steal something—the silverware"; I am not sure whether they got any right there or not, and then he says, "You (Mr. Pugh) asked them at that time in my presence if they was going to arrest me," and he said, "I think so," and you asked them about a warrant and they didn't have much to say to you and my brother-in-law was there, so I had on my overalls, I was working in the backyard, and I said "Boys, let's go in and get some clothes." Mr. Wilkey went in with me and I changed my clothes, put on my clothes, and came uptown. They had me there in that car and I could not see anything at all as to what else was done with regard to the search of the garage and other outbuildings, or searching the house, or anything else. With regard to this garage, or storehouse, they never asked me could they search it, never asked me anything about it at all, and I didn't see them take anything out of there. At the time I was sitting in this car there was several officers, I think, went in the doorway of this garage, and of course the car being where it was, I could not see what they were doing in there, and I could not get out of the car to go over there. I know they did go in there. I did not tell Mr. Sisk that wasn't my place. I did not tell any of the officers that.

(Testimony of D. B. Driskill.)

Cross-examination.

The car that I was sitting in belonged to the officers; I think Mr. Sisk. I don't know who it belonged to; I think Mr. Sisk was the gentleman that drove it up. The car was facing west, and the door where these things were taken out of the garage faces south. This car was thirty to thirty-five feet; I would not say thirty to thirty-five or forty exactly, for I have never measured it; it was between thirty and forty feet east of the entrance of the door. There was an obstruction between the car and the open door. There was a double door swings out, and I could see [49] the door, the door opens out, opens east, and there would be four or five feet wide, but it didn't go clear back, just about two-thirds of the way back, and that would obstruct the view so it would be physically impossible for anyone to see into the garage two feet back. If the door was swung back two-thirds of the way then there would be only a space of a foot or two *out* outside from the building to the edge of the door, from the outer edge to the door, to the back of the building, would only be a foot. I could not see anything removed out of there, because there was nothing removed out while they had me in the car. I saw no truck come up; there was nothing taken away from there while I was in this car under the detention of Officer McGrath, and it was, I understand, of course, I can only talk by hearsay, I understand it was later. There was nothing taken out of there in my presence, and no truck came

(Testimony of D. B. Driskill.)

there. I do not know when it was taken out; I never saw it taken out. I did say the officers were in my house, Mr. Weage and Mr. Sisk. I can't say that Mr. Sisk was there; I said I thought it was Mr. Sisk at the barn door. That is not where he used this rough language toward me. Mr. Sisk was not in the house at the time he called me a "son-of-a-bitch." At the time I mentioned Fred Weage being in there with the search-warrant, I am not sure whether, as I said a while ago, whether it was Mr. Sisk, but I am sure about Fred Weage started to read me the search-warrant. I was very much excited. I did not use rough language towards Mr. Weage and curse him and swear. I told him to get out of it; I never used an oath on the boys. I did not tell them to come ahead or go ahead and make a search if they wanted to. I am positive of that. It may be possible Mr. Wilkey was in there with Mr. Weage when he had the search-warrant in my house, some officer was there; I would not say for sure. I was not out in the alley on the occasion Mr. Sisk used this rough language at me; it was going down my driveway towards my [50] garage. That was before I was put in the car; I was directly on the way to the car. After I was put in the car, I don't know whether I pushed Mr. Sisk aside and climbed out of the car forcibly or not; I don't remember whether I did or not. It was not then that Mr. Sisk told me to get back in there. It was one of the other officers. Mr. McGrath says, "Get back in," says, "Come on back in

(Testimony of D. B. Driskill.)

here, Driskill." Of course, naturally, I was trying to get out of there so I could see what was going on, and for that reason only I wanted to get out of the car to go and see them, and McGrath says, "Come get back in here." I don't know when anything was taken out; I didn't see anything taken out.

I did not say this man Houston came to see me. He did not speak to me about it; didn't say a word to me. I had no arrangement with Houston about using that, and I knew nothing about Houston using it until Luttner told me. I think that was before the things were put in there, I won't be sure about it. I did not know Luttner was charging for it; it would have been all right with me if he had. I don't think Luttner told me he was charging for it. I think Luttner kept a small lock on the door of the building opening into his yard towards his house. Sometimes that would be locked, and sometimes it would not. Most of the time it was not locked. When it was locked, I could go through; he generally kept the key out of reach of the kids. I knew where that key was when it wasn't locked and had access to it. That was on the side of the building on the inside of the yard. Coming from across the alley where I lived, I would not have access to the key without climbing over the fence. If the door was locked I could not get through it, but it wasn't locked, the back entrance to my garage.

I think Mr. Weage said he did not have to read the search-warrant. He read the search-

(Testimony of D. B. Driskill.)

warrant after I told him he would [51] have to read it. He read it to me. Then I discovered that they had no search-warrant for my place, no search-warrant for my place. That search-warrant was for stolen property. It described the property. I forget what it said; I could not remember it.

Thereupon the witness was excused.

The COURT.—Proceed; anything further?

Mr. PUGH.—That is all.

Testimony of Fred A. Weage, for the Government.

FRED A. WEAGE was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination.

I am a deputy United States marshal. I remember the occasion last April when I had a search-warrant for the premises of Mr. Driskill. I did not serve that warrant nor attempt to. I went to Mr. Driskill's house, and his wife came to the door, and I told her I had a search-warrant for the house. Mr. Driskill came through the house at the time in company with Mr. Lucey. I gave a copy of the search-warrant to Mr. Driskill, the defendant here, and started to read the search-warrant to him. I read the search-warrant, and he informed me that that was not the number of this house, and that I could not search the house on that warrant, and he became very abusive, and said, "God damn you; get out of my house, all of you," and I walked with

(Testimony of Fred A. Weage.)

him out in front of the house, and he told me the numbers of the house had been taken off; it was not the number called for in the search-warrant. I told him very well, no need for him to get excited, and I would not serve the warrant at that time. Jack McGrath, a city police officer, and myself and Mr. Lucey were present at that time. No one else was exactly present, although another police officer was in the front yard in front of the house. So I called my assistants off, told them I could not serve that warrant, as a mistake had [52] been made in the warrant, and he says, "Well, go ahead and search, then; search everything." I says, "All right," and I asked Mrs. Driskill if she had any objection to a search being made, and she said, "No, none whatever." I then looked through the house, and Mr. Wilkey, Mr. McGrath and myself. After I looked through the house, I did not make any other search or take any property, didn't find anything called for in the search-warrant in the house. And I went out through the back. When I got into the back I was called across the alley by Mr. Sisk, a Department of Justice man, who had there a trunk containing—

Mr. PUGH.—I object, if the Court pleases, to any further statement about what he found there and what it contained.

The COURT.—He wasn't stating what it contained, just what he found.

The WITNESS.—Q. The trunk was in a small barn or garage across the alley opposite of Mr.

(Testimony of Fred A. Weage.)

Driskill's place, directly on the alley of Mr. Driskill's place, Mr. Sisk was there. I saw the trunk. The trunk was in this small barn or garage, also a barrel of empty pints, empty pint bottles. Mr. Sisk went out as an assistant to me on this search-warrant, all of the other officers also. Mr. Sisk and Mr. Lucey and Mr. Wilkey were in one automobile. They went through the alley; they were to go at the rear of the house. They took possession of the trunk and barrel. I took possession of the trunk and barrel after Mr. Sisk had handed it over to me. I saw where he got the trunk and barrel. He got it in this garage or barn opposite Driskill's place across the alleyway, directly in the rear, the place that belonged to Mrs. Luttner. That was after the conversation I have told about between Driskill and his wife in their house with reference to the service of a warrant or making a search. The truck was ordered and I accompanied the truck driver with the barrel and the trunk and contents, and brought it to our office up here. At the [53] time the barrel was taken out of the garage, the barrel and trunk, Mr. Driskill was sitting there in the car that Mr. Sisk had. The car was about one hundred feet up the alleyway from the garage. The trunk and barrel were loaded on the truck right in back of the garage as near the door as it was possible to get it. That was in plain view of the car where Mr. Driskill sat. I heard considerable conversation and had some with Mr. Driskill while he was in the car, and

(Testimony of Fred A. Weage.)

while the things were being taken out of the garage and loaded on to the truck. Nothing in reference to the taking out of the trunk and barrel. He made no objection in my hearing to taking the trunk and barrel out of that barn. He made no statement to me as to whose barn that was, nor in my hearing. I did not tell Mr. Driskill in his house that I did not have to read the search-warrant to him. I did not use any rough or bad language toward him at that time.

Cross-examination.

After my attention was called, that it had a mistake in the search-warrant, Mr. Driskill ordered us off the premises. I believe his wife was present at the time. That was in the vestibule of his house, inside the door. I had walked in there with the consent of his wife. His wife came to the door before he did. She told me to come in. I told her what I wanted when she told me to come in. She told me to come right in. Then after Mr. Driskill used this rough language at me and told me to get away, he told me I might come on through. He said, "Go ahead, you can search everything." He just said, "Go on." I don't think anybody arrested him. I think Mr. Sisk detained him. I don't know as I would say "Took him." He detained him. He did not detain him by one arm that I saw. Mr. Sisk did not go through the house with me after this invited search. He did not go around with Driskill, around the house on the east side that I saw. After I [54] had completed my in-

(Testimony of Fred A. Weage.)

vitation on these premises, and got out of the back door, I found Mr. Sisk back on the side of the barn, back behind. He did not have a search-warrant back there. He was working under me. I told him to go over the rear of the premises. That is what I call the rear of the premises. I did not tell him to enter any buildings and search in the rear of the premises. He did not have any authority from me, as holder of the search-warrant, to go into that shed or barn across the alley on the adjoining property. I don't know that he first put Mr. Driskill in the car before he went into the storeroom, I don't see how he came, because Mr. Driskill came through the house, and I read the search-warrant. After I went through the house, and after Mr. Sisk came around the back way, and I went out and saw Mr. Sisk again, Mr. Sisk was in the barn when I first saw him, and Mr. Driskill was in the car. He was being detained by Mr. Sisk. Mr. Sisk was in the garage. I mean to say that Mr. Sisk was in this barn or garage, but he was detaining Mr. Driskill in the car one hundred feet east. He was doing this detaining through the instrumentality of Mr. Lucey, I think. I don't think anybody else at the time. I did not notice whether there was any force used in this detention at that time. I did see Mr. Driskill try to get away a couple of times after he was in the car, I think he made one attempt, pretty near got out of the car, and he was held back by the officers, by the police officers. The car was standing still at that

(Testimony of Fred A. Weage.)

time. He wasn't under arrest there by me. He was not under arrest by anybody that I know of. I think he was detained by Mr. Sisk. I detained him on down town following that for some time.

Thereupon, a recess was taken until nine-thirty o'clock A. M., October 29, 1921. [55]

9:30 o'clock A. M., October 29, 1921.

Testimony of Daniel J. Lucey, for the Government.

DANIEL J. LUCEY was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination.

My name is Daniel J. Lucey. My official position during last year was inspector, City Police Department. I have been such about a year. I was so engaged during April of this year. I was present at the time when the search of the premises were made out near Mr. Driskill's house, at the time he was arrested or taken into custody. I was in the house at the time Mr. Fred Weage, deputy United States marshal, was there for the purpose of serving a search-warrant. There were in the house, Mr. McGrath and a Deputy United States Marshal Weage. I also think that Officer Balz was there, but I am not sure, and Mrs. Driskill, I believe, was there, and also the defendant. No one else was there that I can recall. Mr. Sisk wasn't in there at the time. Mr. Wilkey was not there at the time. The deputy United States marshal began to read the warrant,

(Testimony of Daniel J. Lucey.)

the search-warrant, and I believe until he got to the address of the house, I believe it called for the wrong address, 2218, I believe, the search-warrant called for, and at that moment the defendant Driskill turned around and he says to all of us, "Get out of this house, and be damn quick about it; get out, all of you," so we got out. He said, "This warrant does not call for my house." We got out. I was afterwards in the house. The second time I went in the house, Mr. Sisk, Mrs. Driskill, Weage, McGrath and myself were there. While I was standing there, and the defendant Driskill turned around to all of us, and he said, "Search the house, search it, search everywhere, search it any place, search it anyhow," and we started to searching. I searched most of the rooms in the house, inside the house. I did not search anywhere else while inside the house. Outside of the house, we went into [56] a place across the alley and found a trunk. At that time I believe Mr. Driskill was in the house, I believe Officer Balz was with him at the time. I know he was in the house getting dressed and putting other clothes on. Mr. Sisk and Mr. Wilkey went into the building across the alley and made the search first, then later on I went in. That is all, the three of us. While waiting for Mr. Driskill to get dressed, I believe the trunk and booze was taken out of there.

Mr. PUGH.—Now, I move to strike that out, if the Court pleases.

The COURT.—It may be stricken, and the jury

(Testimony of Daniel J. Lucey.)

will disregard the statement the trunk and booze was taken out of there.

"A trunk and barrel; the contents of the trunk was, I believe, seven pints."

Mr. PUGH.—I move to strike out that answer.

The COURT.—It may be stricken.

"That was all that was taken out, the barrel and trunk. Mr. Driskill was in the house, I should judge, about half an hour. When he came out of the house I was in the alley across the way, north of Mr. Driskill's house in the garage, and the box and trunk, when he came out of his house, were still in the garage. When Mr. Driskill came out, I was placed in charge of him by Mr. Sisk. Mr. Sisk told me in Mr. Driskill's presence, to watch Mr. Driskill, and he also told Mr. Driskill beforehand that he was under arrest, that he was a Government man and he showed him his badge and told him he was under arrest. He told me to stay with him in the machine, which I did, and Mr. Driskill then got out of the machine and went to talk to Mr. Sisk, and told Mr. Sisk that nobody could arrest him, so Mr. Sisk got hold of him by the arm, gently by the arm, and says, 'The next time you get out of the machine I will have to put the cuffs on you.' He did not say at that time within my hearing to Mr. Driskill, 'You bootlegging [57] son-of-a-bitch, I will knock you in the head with a six shooter or gun,' or words to that effect. I was there; I didn't hear it. I was there at the time he was put in the car and when he got out of

(Testimony of Daniel J. Lucey.)

the car, and when he was put back in the car. At that time, as soon as Mr. Driskill got out of the car, I followed him to Mr. Sisk, about four or five feet. After Mr. Sisk put Mr. Driskill back in the car, I stayed with Mr. Driskill. Mr. Sisk, I believe, went about, up into the garage, I believe, across the way. Then I believe that Mr. Driskill asked to go in the house, and I accompanied him in the house until he got things straightened out, that is, his clothes, and such as that. I was in the house during that time, while Mr. Driskill was in the house. I came out with Mr. Driskill. When he came out he got in the city machine, I believe, and we took him to the station. When the trunk and barrel were taken out of the shed, I believe, Mr. Driskill was in his house. When the trunk and barrel were loaded into the truck, he was in the house. He was in the house when the trunk was taken away from there.

Cross-examination.

I went to the Driskill house with Mr. Sisk and Mr. Wilkey and Deputy United States Marshal Weage. They had not deputized me. My authority was that of a city police officer. I was acting on my responsibility as a city police officer when I did what I did there. When I arrested Mr. Driskill or held him I was acting then as a police officer. I did that at the direction of Mr. Sisk. He is a United States Government officer. I was acting as assistant to him as an officer of the Government, of the United States Government, helping him out

(Testimony of Daniel J. Lucey.)

in this arrest. When Mr. Driskill found out that the warrant was for the wrong place, that the number was wrong on the house, he told us all to get out of there. We got out. He followed us out. He wasn't in a very good humor then. He used some rather strong language. I should judge [58] it was about a half an hour after that that he was taken in charge by Mr. Sisk. I was there that long. I mean to say that after he had ordered us out and before Mr. Sisk took him in charge, he got in a good humor and invited us in. Immediately after he invited us in, I did not put him under arrest. After he came out, after he told us to search anywheres, or any place at all, he came out towards the alley, this defendant Driskill came out in the alley, and then he told, that is the time he jumped out of the machine, he said nobody could arrest him on account of the warrant, he said nobody could search his house. He told us to go ahead and search. I did not hold him in the car after he told us to go ahead and search. I had charge of him. He did get out. I told him to stay in. While I was searching the house, Mr. Driskill was in there dressing. He seemed to be in a good humor. When I first went in there he had working clothes on. I dont' know whether he was getting ready to go somewhere when he went in there to dress. Nothing said about going to take a little trip at that time that I heard. I did not find out why he was taking off his paint clothes and putting on his go-to-meeting clothes at that time. Nothing said about going to the city jail that I know of. I

(Testimony of Daniel J. Lucey.)

don't know of any trip he contemplated at that time. As soon as he refused to let us go in the house, and used this language, I did not immediately put him under arrest and tell him to dress, and as soon as he was dressed, took him out to the car and kept him there. I know he was dressing. I did not hear Mr. Sisk call him a bootlegging son-of-a-bitch and threaten to hit him with a gun. I saw you (Mr. Pugh) there. After you came I did not hear Mr. Driskill in the presence of Mr. Sisk repeat those same words, and I did not hear Mr. Sisk say at that time, 'Well, which one do you deny, the bootlegging, or the son-of-a-bitch?' I did not hear Mr. Driskill repeat that to you and tell you he had called him that and threatened [59] to hit him with a gun. I was there. I didn't hear a statement to that effect; all I heard was Mr. Sisk said, 'If you don't stay in the machine I will have to put the cuffs on you.' To the best of my knowledge, I believe that the truck left the premises first. Now, that I could not say because we were in the house at the time, and the machine was waiting out in front, the city machine. I did not see the truck leave there with this barrel. I was in Mr. Driskill's presence all during this period that the truck was there and I didn't see it. I could not see it from the house."

Thereupon the witness was excused.

Testimony of J. J. McGrath, for the Government.

J. J. McGRATH was called as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

Direct Examination.

My name is J. J. McGrath. I held the official position of police inspector, City of Phoenix, during last April. I made a trip out to the premises of Mr. Driskill during April, along about the 21st or the 23d of April. I went out there with Officers Lucey, Balz, and myself, of the police department, and Mr. Sisk, Wilkey, and Fred Weage, of the Government. I went there at the *rest* of Mr. Sisk and Mr. Wilkey and Mr. Weage. After arriving there I was in Mr. Driskill's house when Mr. Weage went in there to serve the search-warrant. I heard a conversation between Mr. Driskill and Mr. Weage. I was not present at any time when Mrs. Driskill was there. I did not hear Mr. Weage say to Mr. Driskill that he did not have to read the search-warrant. Officer Lucey and myself and Mr. Weage, not Lucey,—I will change that to Officer Balz,—I said Officer Lucey, went to the front door. Mr. Weage knocked on the door, if I remember right; Officer Lucey brought Mr. Driskill into the house, to the front of the house and said Fred Weage had the warrant, he wanted to [60] serve on him, and Mr. Weage started to serve the search-warrant, and if I remember right he read it on through, and when he got through reading

(Testimony of J. J. McGrath.)

the warrant, Mr. Driskill told him, he said, "My number is not 2216 West Washington; it is 2248; get out of my house, all of youse." We stepped out of the house. I never did afterwards go back into the house. I was in the front end of the house most of the time. I remained there. After that, later on, quite a bit later on, why Mr. Driskill gave them permission to search the house, told them to go ahead. He said, "Go ahead and search everything," he said, "If you want to." The house was searched. The garage just north across the alley from Mr. Driskill's house was searched. I was not in the garage when it was searched. We were still in the front end of the house,—I was still in the front end of the house. I remained there all of the time watching the prisoner. I don't know what took place out at the garage then. I was not there when Mr. Driskill was put in the car nor when he got out of the car.

Cross-examination.

Mr. Driskill later gave permission to search the house. If I remember right, there was present Officer Lucey, Fred Weage and myself, and Joe Balz. Mr. Driskill was present. That took place just about halfway I think, from between the house, say from the front end of the house to the rear; it was about half way. It was not in the house, it was on the outside of the house. On the east side. We were all present out there. I don't believe Mr. Driskill had been arrested yet. He had not changed clothes for any trip yet. I did not see Mrs. Dris-

(Testimony of J. J. McGrath.)

kill at that time. After he said search there, I just stayed there on the car out in front. Officer Lucey was the one who went to search and I would not say the other because I don't remember. They must have kept Driskill out in the back, in the alley, when they did this searching. I guess they took him out to the car. [61] While he was inviting them to search, I guess they put him under arrest, and put him in the car right there in the back alley. After this, later, I did have custody of Driskill out there in the car in the back alley. Officer Lucey was with me there at first. I did not hear any conversation there after I came out between Driskill and Sisk. I recall that about this time after I was back in the alley there, that you (Mr. Pugh) came there to the car, and also Mr. Bolin, another man came there. I do not remember Mr. Sisk coming there at the time and you asking him whether or not Driskill was under arrest. I do not remember Mr. Sisk calling Mr. Driskill any names there on the car. I do recollect that in your (Mr. Pugh's) presence and in my presence Mr. Driskill told me and you together that Sisk had called him a bootlegging son-of-a-bitch. I do not recollect that Mr. Sisk answered back, "Which one do you deny, the son-of-a-bitch or bootlegging?" I did not hear that. I don't remember anything Mr. Sisk said back at all, but I do remember Mr. Driskill accusing him of having that done. I could not refresh my recollection and memory as to what Sisk said. I could not recollect just what was said.

(Testimony of E. B. Sisk.)

I do not know whether he admitted it or not, I didn't hear him. I didn't hear him admit it, and didn't hear him deny it that I remember of.

Thereupon the witness was excused.

Testimony of E. B. Sisk, for the Government (Recalled).

E. B. SISK was recalled and having been theretofore duly sworn, testified further as follows:

Direct Examination.

I remember the time of the taking into custody of Mr. Driskill. I do not remember using this language, or anything like it: "You bootlegging son-of-a-bitch, I will knock you in the head with a six-shooter." Mr. Pugh was there; he came there while we were there. I would not be able to say definitely how [62] long before I left that he came there; he was telephoned in town after we got there, and I judge he was there some minutes, probably ten or fifteen minutes before we left.

Cross-examination.

Mr. Driskill did accuse me there in the alley of having called him names. I said at the time that you (Mr. Pugh) came there, and I recollect definitely him saying that I had called him some name and applied some epithet to him, the exact words I don't remember that he used, and my reply was that whatever I had said to him had been done to subdue his resistance to arrest, and that any forcible language I had used to him was to prevent injuring physically, and I said, "That is better in my opinion," "Whatever I did say to you was better than

(Testimony of E. B. Sisk.)

using force on you, wasn't it?" and he said, "Yes." I recollect giving him that little lecture at that time. I gave him another one before that time, gave another lecture, told him in my opinion I was not only authorized but directed by the prohibition law to place him under arrest when he was found transporting liquor, without a warrant, he maintaining we didn't have a warrant, and defying us to arrest, and it was necessary for me to forcibly arrest him. He dared us to lay hands on him. When Mr. Driskill accused me of using those words, I do not remember of having answered in substance like this: "Which one do you deny, the bootlegging or the son-of-a-bitch?"

I went there in my car. I stopped that car out there around in the alley in the rear of Mr. Driskill's premises, I should say twenty-five feet. I left the car in the rear of Mr. Driskill's premises, about twenty-five to thirty-five feet, I should say, east of his garage, and on the same side of the alley as his garage. I saw from the place where I was in the car, saw him in that building from there fooling with a trunk. Both doors of that garage that he was in, the garage was across the alley [63] from me, I was sitting this way from it (indicating), across the alley, and both doors were wide open, and he was directly in the corner, he was not over a foot from the alley line where we found the trunk and where he was at that time, was not out of sight, but right in the doorway and pushing the trunk

(Testimony of E. B. Sisk.)

into that corner, which would be the southwest corner of that garage and in plain view.

Redirect Examination.

He was pushing the trunk west against the corner wall, and when the door would have been closed, would have been directly against the door of the garage which opened on the alley. The trunk was inside of the door at the time, but right on the door line, and he was pushing it against the wall, to the west wall. When I saw Mr. Driskill he was in that position (indicating), stooping with his hands on the trunk, and as I stopped he raised up. I did not say the trunk would protrude out beyond the door facing, when the door closed it would have been right in the corner of the garage. In other words, there was just room between the other articles for the trunk to be placed in the corner; the two doors were open. There was just room enough for the trunk to stick behind the other things, and the door.

Thereupon the witness was excused.

Testimony of Mrs. Louise C. Driskill, for Defendant.

Mrs. LOUISE C. DRISKILL was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination.

My name is Louise C. Driskill. I am the wife of the defendant. I recollect the occasion of a number of officers coming to my place some time in March

(Testimony of Mrs. Louise C. Driskill.)

or April. It was about, I should say, close to noon, about eleven o'clock. I was out in the yard, and at the time I was hanging up clothes, and I heard the telephone ring, and I called the boss to come answer the phone, but [64] I went in ahead to answer it, and when I got in the room, I come through the kitchen, and boss came after me, and went—by the time I got in the room the men were in the front hall; he came in before me. It seemed they had a paper there, supposed to be a search-warrant, but the number was not right, and Mr. Driskill just took and told them to go out, and to get off his property and out of his house. They had tried to push in, and he just talked and made a motion to exclude them all out, just brushed them out, and they went out then. Then they took Mr. Driskill and put him in the car, in the automobile, in the back alley. Then they asked my permission to telephone. Mr. Sisk did, and Mr. Driskill said no, he could not telephone, and then he changed his mind and said, "What do you want to telephone for?" and he said he wanted to call the Lightning Delivery. I did not in any way give them any permission to search the place. Mr. Driskill did not in my presence give them any permission to search the place; on the contrary, he said they should not. I was not constantly in the presence and hearing of Mr. Driskill at all times until he was placed under arrest and taken around to the car. I was there part of the time and part of the time I went in the house. I did not hear all of the conversations that took place

(Testimony of Mrs. Louise C. Driskill.)

in the house. At the time they first entered I was right there. The time they came the second time I was telephoning, I was at the telephone, and the door was shut, and they were waiting, Mr. Sisk and Mr. Weage, as I remember, were the only ones that were on the front porch waiting for me to finish talking. Then they knocked at the door. I opened the door. They said, "We have found these things, this stuff Mr. Driskill had," and asked me if there was a still in the house, and I said, "No, sir, there is no still here; never has been." And they said, "You could not refuse to let us in the house." Mr. Sisk said that. I didn't say anything at all. They said it would save us a trip from coming [65] back, and I said, "There was no still there and never has been"; those are the only words I used. They searched the house then; they said, "You could not refuse to let me in," and I opened the door, and they came on in; I didn't tell them to come in. Mr. Driskill was then out in the car. He had already been taken out at that time. And he made a motion to get out, and they pushed him back, and said he must not come. He was still protesting out there against them going through the house. He always did protest against them going through the house.

Cross-examination.

Mr. Sisk knocked at the door and said they had found some things. They did not say what they had found. He said they had found the stuff Mr. Driskill had in the back shed. When I spoke of

(Testimony of D. B. Driskill.)
someone as the "boss," that is Mr. Driskill. There wasn't anybody else there at that time with me except Mr. Driskill. My brother came later.

Thereupon the witness was excused.

Testimony of D. B. Driskill, in His Own Behalf (Recalled—Cross-examination).

D. B. DRISKILL was recalled and having been heretofore duly sworn, testified further as follows:

Cross-examination.

I testified on direct examination that I went over to the Luttner house that morning. To the best of my judgment I think that was eight-thirty or nine o'clock. I went over there to see something about some lattice work. When I went over there that time the door on the inside of the premises was not locked. There was no lock that morning. I can't say positively whether I was over there the day before or not; I had been working there off and on. I never did finish the house; they moved into it before I got it completed and I would paint one floor one day and—I was not busy painting my own house that day. I am not sure whether I was painting the day before on my place or not. I can't [66] remember being there the day before.

Thereupon the witness was excused.

WHEREUPON, both parties having closed upon the said issue upon said petition for restoration of the property and for restraining order, and the answer thereto, the Court made the following ruling and statement:

The COURT.—Is the matter submitted?

Mr. LANGSTON.—Yes.

The COURT.—Upon the matter of the introduction of this trunk and barrel, involving the right of search and seizure under the Fourth and Fifth Amendment to the Constitution, I will say that officers have no right at any time to search anybody's premises without his permission or without a search-warrant, and the search-warrant must be definite and certain and describe the premises searched as has been repeatedly held. There is, however, no intimation against the consideration of the Court and the jury in testimony of any property which was unlawfully in the possession of the gentleman, that is, if the Government is not a party to the infringement of the constitutional right. Inhibitions of these sections of the Constitution simply go to the right of public officers to invade the home of a party, and when that is done, of course, such testimony may not be used when procured by the wrong-doing of officials. If any other person wrongfully invades anybody's premises, they are amenable to the party under the general provisions of law, and if the Government should obtain possession of property unlawfully obtained by some other person to which the Government officials were not a party, there is no rule which would prevent under such circumstances the introduction of such property as testimony in the case. Now, this matter was fully considered by the Supreme Court of the United States [67] in the case of Bordeaux against McDowell. It has not been reported in the

Supreme Court Reporter, but is in the advance sheet filed on the first of June, 1921. In that case some parties actually broke into a person's office, blew open his safe, took out documents and papers and letters and files, and other matters, which showed conduct on the part of persons who seized documents which not only violated contractual rights of parties, but likewise showed that they had transgressed the laws of the United States, or state. The parties who stole these articles turned some of the articles over to the office of the Attorney General. Petition or action was started against the officials for the purpose of having these returned, and the Supreme Court of the United States held that the Government, not being a party to the transgression, there was no constitutional principle which required the Government to surrender the papers under such circumstances, but the parties had their remedy against the individuals who transgressed their rights, but so far as the Government was concerned, it would not require the Government to return the property, and it could be used as testimony. Now, in this case I observed yesterday, though I didn't think it was very material what did transpire in the house with relation to the discussion of the search-warrant and the wrong number on the search-warrant of the premises, I am still of that opinion, this garage in which these articles were found was not a part of the premises of the defendant; they belonged to the premises which had been leased to another party. At the time of the lease no garage was on those other premises; the garage was con-

structed upon those premises, and taking the most favorable view of the testimony so far as the defendant is concerned, he reserved the right to store some articles in this garage. The special agent of the department,—I do not recall his name,—testified yesterday that the defendant stated that was not his property. The defendant [68] denies that upon the stand. I am inclined to the view that this statement was made, taking all of the circumstances into consideration. Now, if he denied to the officers at the time that that was his premises, of course the officer had no reason to believe that the defendant had any right in that property, the officer then taking his testimony, and likewise the testimony of Mrs. Luttner, and the consent of Mrs. Luttner upon whose premises this garage is, removed the trunk and the barrel and the contents, now, then, the officer did not transgress any rule, he got the property from the person in whose possession it was, he violated no one's right. Now, in this petition for the return of the property, and in the testimony, there is no testimony before the Court that the defendant claims this to be his property. I was careful to listen to any claims of his of ownership, so there isn't anything before the Court to show that the defendant has even any right or interest in this property, in the trunk or the barrel, or any relation to it, another matter that bears upon the contention of the defendant and the Government, while it bears upon the matter I suggested yesterday as to the right to search the house. Now, this indictment being returned on the 27th of April, the property was

seized upon the 23d of April, 1921. Now, the defendant at no time asserted that that was wrongfully taken, or that any constitutional right of his was transgressed until the 24th day of October, 1921, the date when this case was set for trial, so that that would indicate that the testimony of the officers that permission to search the premises was obtained, to be true, and conceding both facts, that this garage may be considered as a part of the defendant's premises, the strong preponderance of the testimony of and circumstances discloses, brought out the contention on the part of the officers that testified that they were given permission to search the premises, but this property having been voluntarily delivered to the officers by the party in whose possession [69] it was, that is, I mean by that, by the party upon whose premises the garage was, and in which it was stored, and the defendant having conceded that that was not his garage, that he might not now contend that he has any right which was transgressed by the officers, and that this is wrongfully in the possession of the officers of the United States.

The motion, therefore, will be denied,—the objection to the admission of this property will be denied, and an exception may be noted. The cases that were called to my attention yesterday, United States against Slosser, and United States against Keeler, have no application to the facts disclosed in the petition, and the rule stated by the Supreme Court, and the facts in this case, to the facts in the case of Bordeax versus McDowell are, while not similar,

yet these facts come under the same general statement. You may proceed."

Thereupon the following proceedings were had:

Testimony of Fred A. Weage, for the Government. (Recalled).

FRED A. WEAGE was recalled and having been heretofore duly sworn, testified further as follows:

Direct Examination.

I took the trunk and the barrel that I found at this garage and brought them to the Federal Building, to the marshal's office, where they have been since in the marshal's custody, the United States marshal. I opened them and looked into them after I brought them to the building.

Q. What did you find in the trunk? A. The trunk contained—

Mr. PUGH.—If the Court pleases, I want to object to the introduction of the answer to this question, to the introduction of any testimony with regard to the contents of the trunk, the barrel, or any other property taken from the premises of the defendant, and upon these specific grounds set out in the motion [70] that has heretofore been filed and heard in this case.

The COURT.—Overrule the objection.

Mr. PUGH.—And I would like to have that objection understood as applying to further questions.

The COURT.—It is saved to you. Overrule the objection.

(Testimony of Fred A. Weage.)

Mr. PUGH.—And an exception to the Court's ruling.

Mr. LANGSTON.—Q. What did you find in the trunk?

And, in answer to the said question, the said witness was allowed over the objection of the attorney for the defendant, to state, and did state as follows:

"The trunk contained quite a quantity of empty pint bottles, and seven bottles filled, with the seals unbroken, of Saffel Whiskey, *snf ninr* bottles of tequila and two jars of white mule whiskey."

That the counsel for the defendant, David B. Driskill, did at the time of the introduction of the said testimony against the defendant, and in each instance of the offer thereof, insist that the said evidence so offered to be given by the plaintiff, to-wit, the contents of said trunk and barrel so obtained as heretofore shown in this bill of exception, was not admissible on account of having been procured and obtained by the United States Government unlawfully and in violation of the constitutional rights of the defendant, as set out in his aforesaid petition, which was and is hereby incorporated as a part of the defendant's objection to the introduction of the said testimony.

But his Honor, the said Judge, held and affirmed that the said evidence so offered to be given by the United States of America, as aforesaid, was good and admissible in law, and thereupon, the same was allowed to be given in evidence against this

defendant, to which ruling of his Honor, the said Judge, the defendant prayed a bill of exceptions in accordance with law and hereby presents the same.

Dated this 31st day of December, 1921.

JEREMIAH NETERER,
Judge. [71]

District Court of the United States for the District of Arizona.

PHOENIX—1323—C.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID B. DRISKILL,
Defendant.

Bill of Exceptions No. 2.

BE IT REMEMBERED that on the 28th day of October, 1921, at a term of the said Court held at Phoenix, Arizona, in and for the District of Arizona, before his Honor, Jeremiah C. Neterer, Acting District Judge, the issue being joined in the above cause between the United States of America and David B. Driskill, the defendant, the same having been called for trial by the Court, with a jury duly empaneled, and the United States of America appearing by J. H. Langston, Assistant United States Attorney, and the defendant appearing in person and by Spencer B. Pugh, his attorney, and the jury having been empaneled and

sworn; and witnesses having already been introduced and the testimony having been concluded upon the petition of the defendant for the restoration of the property and for a restraining order, and the case having been called for trial upon the issue of the guilt or innocence of the defendant:

THEREUPON, the following proceedings were had, and hereinafter set out is the whole testimony and evidence adduced upon said issue up to the time that the Government rested and the motion hereinafter set out was made by the defendant through his counsel for a directed verdict, to wit: [72]

Testimony of Fred A. Weage, for the Government (Recalled).

FRED A. WEAGE was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination.

I took the trunk and the barrel that I found at this garage and brought them to the Federal Building, to the marshal's office, where they have been since in the marshal's custody, the United States marshal. I opened them and looked into them after I brought them to the building.

Q. What did you find in the trunk?

A. The trunk contained—

Mr. PUGH.—If the Court pleases, I want to object to the introduction of the answer of this question, to the introduction of any testimony with regard to the contents of the trunk, the barrel or any other property taken from the premises of the defendant, and upon these specific grounds set out

(Testimony of Fred A. Weage.)

in the motion that has heretofore been filed and heard in this cause.

The COURT.—Overrule the objection.

Mr. PUGH.—And I would like to have that objection understood as applying to further questions.

The COURT.—It is saved to you. Overrule the objection.

Mr. PUGH.—And an exception to the Court's ruling.

The trunk contained quite a quantity of empty pint bottles, and seven bottles filled, with the seals unbroken, of Saffel whiskey, and nine bottles of tequila, and two jars of white mule whiskey. White mule is distilled home brew, you might say, by ordinary distilling, and uncolored high proof, containing a large amount of alcohol. That is one of the bottles that was in the trunk, and also one of the bottles that was stolen from the Government warehouse.

Mr. PUGH.—I object to that statement, if the Court pleases.

The COURT.—That will be stricken; the jury will disregard it.

Plaintiff's Exhibit "B" is one of the bottles that was in the trunk. Plaintiff's Exhibit "C" is one of the jars of the white mule. There were two jars in the trunk. The barrel contained empty pint bottles including one empty bottle, that had [73] contained Sassel whiskey. That bottle is in the vault in our office. I will get it. That is the trunk that I brought to the Federal Building, and the con-

(Testimony of J. E. Wilkey.)

tents. That is the barrel, and the contents of the barrel.

Mr. LANGSTON.—I will ask to have the trunk and barrel designated as exhibits.

The COURT.—They may be marked.

(Trunk and barrel marked Plaintiff's Exhibits "D" and "E.")

Mr. PUGH.—If the Court pleases, I object to that. I object to the barrel and contents. I understand there is no charge of having transported empty bottles and barrels and I think it is not material in this case, and it encumbers the record.

The COURT.—Denied.

Thereupon the witness was excused.

Testimony of J. E. Wilkey, for the Government.

J. E. WILKEY was called as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

Direct Examination.

I am a special agent of the Department of Justice. I have seen Plaintiff's Exhibit "A" for identification before. About April the 21st, I found this trunk in a garage. I took this bottle over and had it analyzed for alcoholic content, to a chemist by the name of Dr. Goss in the Physicians' and Surgeons' building, Phoenix. I have seen Exhibit "B" before, under the same circumstances. The same as to Exhibit "C" I examined the trunk as to contents. It contained two jars of white mule. They were in the trunk. And this here tequila, nine bottles of tequila, and seven bottles of Saffel whis-

(Testimony of J. E. Wilkey.)

key, I found empty pint bottles in the barrel. There was one empty bottle, whiskey bottle, found [74] in the bottom of the barrel, and it bore a Sassel label. There was a bottle like this; I didn't mark it; I didn't mark my initials on it; there was a bottle like this, a Saffel bottle.

Cross-examination.

I found this stuff on Mrs. Luttner's premises, in Mrs. Luttner's garage, or premises.

Thereupon the witness was excused.

Testimony of Mrs. W. H. Luttner, for the Government.

MRS. W. H. LUTTNER was called as a witness on behalf of the plaintiff and after being duly sworn, testified among other things:

I reside at 2245 West Adams; I know the defendant Driskill; know where he lives; I live opposite the alley; opposite his house across the alley; I rent those premises from Mr. Driskill; Mr. Driskill constructed the garage or building and since it has been constructed I have had possession of part of it. I have used it as a storehouse for our furniture, and I keep jellies and different things out there. We do not keep any automobile. I remember an occasion of Mr. Sisk and some other officers coming there. He asked me whether I cared whether he moved that trunk that was near the side and I said no, I did not care, because it did not belong to me, and I did not know who it belonged to, and he could take it. He said he found a barrel with some

(Testimnoy of Mrs. W. H. Luttner.)
bottles in it and I said he could take them too because it did not belong to me. Mr. Driskill had said something to me about taking something in there; it was either on the same morning or on the morning before; he asked me whether he could put a trunk in the shed and I said he could; he asked me whether I thought there was room enough and I said yes, I thought there was. That was before the trunk was put in there. The trunk and the barrel and the bottles were taken away that day. I do not know by whom.

The witness was excused. [75]

Testimony of E. B. Sisk, for the Government.

E. B. SISK testified on behalf of the plaintiff among other things, as follows:

I went there in my car; I stopped that car out there around in the alley in the rear of Mr. Driskill's premises, I should say twenty-five feet; I should say east of the garage, and on the same side of the alley as his garage. I saw from the place where I was in the car, saw him in that building from there fooling with a trunk—both doors of that garage that he was in, the garage across the alley from him, and was not over a foot from the alley line where we found the trunk, and where he was at that time, and was not out of sight but right in the doorway pushing the trunk into that corner which would be the southwest corner of that garage and in plain view.

And on redirect said: I did not say the trunk *protrude* out beyond the door facing; when the

(Testimony of Fred A. Weage.)

door closed it would have been right in the corner of the garage. In other words, there was just room enough for the trunk to stick behind the other things and the door.

Testimony of Fred A. Weage, for the Government (Recalled).

FRED A. WEAGE was recalled, and having been theretofore duly sworn, testified further as follows:

Direct Examination.

Plaintiff's Exhibit "F" came out of that barrel, the barrel marked Plaintiff's Exhibit "E."

Cross-examination.

I took the bottle out. I did not have anything in it at that time.

Thereupon the witness was excused.

Testimony of H. L. Goss, for the Government.

H. L. GOSS was called as a witness on behalf of the plaintiff and being first duly sworn, testified as follows:

Direct Examination.

My name is H. L. Goss. I have made an analysis of the contents of the bottle marked Plaintiff's Exhibit "A." [76] I find that this sample designated "A" contains ethol alcohol percentage, one hundred and one proof spirits, corresponding to about fifty per cent ethol alcohol, fifty per cent by volume of alcohol. I have made an analysis of Plaintiff's Exhibit "B." Exhibit "C," my mark, this exhibit "C" containing ninety-five proof spirits, corresponding to about forty-two per cent ethol

(Testimony of H. L. Goss.)

alcohol by volume. It is somewhat hard to say what sort of liquor it is, other than it is alcohol containing a small amount of organic matter; I would hardly know how to designate that. I analyzed Exhibit "C," my mark B. I found this to contain ninety-six and four-tenths proof spirits, corresponding to about forty-eight per cent ethol alcohol by volume, looks very much like a poor grade of white mule. These papers are reports of analysis made upon the samples which have been offered, simply usual routine laboratory reports. I think Exhibits "A," "B," and "C" could be used as alcoholic beverages.

Thereupon, the witness was excused and the Government rested.

The contents of the trunk were admitted in evidence.

WHEREUPON, the following motion as a basis of the defendant's second assignment of error herein was made by the defendant through his counsel:

"Mr. PUGH.—If the Court pleases, the defendant moves that the Court should—moves the Court to give the jury a peremptory instruction to find for the defendant on the ground, on both counts of the indictment, upon the ground that insufficient evidence has been introduced to make out a *prima facie* case either of the transportation or the possession of intoxicating liquor, and that the defendant be discharged.

The COURT.—Denied. Proceed."

WHEREUPON, the following testimony was offered by the defendant.

Testimony of W. H. Luttner, for Defendant.

W. H. LUTTNER was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination.

My name is W. H. Luttner. I have testified in this case [77] before. I have partial possession of a garage or storehouse that has been testified about in this case. I can't say positively whether I have seen that trunk before. I have no information as to who the trunk belongs to, or who put it in the garage. I know of John Houston putting a trunk in there.

Mr. LANGSTON.—Just a minute, if the Court pleases. I object to this question, it being incompetent, irrelevant and immaterial, and not tending to prove any issues in the case. He said a trunk, and we are not concerned about other things.

The COURT.—Sustain the objection.

Mr. PUGH.—If the Court pleases, my purpose is to show that—

The COURT.—I understand the purpose. Confine it to this trunk.

The WITNESS.—"I don't think John Houston put this trunk in the garage. I do not know whose trunk it is. I have had occasion to observe the location of the garage, and the back doors of that garage or storehouse, on the back part of my premises. I have had occasion to observe the position of the doors. The back side of the garage on my premises faces to the south. As near as I know it

(Testimony of W. H. Luttner.)

is exactly in line north and south. The alley runs east and west. The alley is approximately twenty feet wide, probably more; I don't know. There is one double door on my garage, on that garage opening into the alley. Those doors open outward toward the alley, one to either side.

Thereupon the witness was excused.

Testimony of Charles L. Vogt, for Defendant.

CHARLES L. VOGT was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination.

My name is Charles L. Vogt. I am a brother-in-law of the defendant. I have had occasion lately to examine the premises with reference to the location of the Luttner garage on the alley back of Mr. Driskill's house. The back of that garage faces to the south. The alley runs east and west. The doors of the garage open to the south. I was at the Driskill premises on the day in [78] April when he was arrested and some search was made there. At that time I noticed the location of the Government car, automobile that stopped in the alley. It was located about thirty-five or forty feet from the door of this Luttner garage or storehouse.

Q. Now at the place that the car was located, you may state whether you have made any tests or seen any made to determine whether or not from any portion of the position where that car was located,

(Testimony of D. B. Driskill.)

that with the doors of the garage open, a view would be possible into the inside of the garage.

Mr. LANGSTON.—That is objected to as calling for a conclusion of the witness.

The COURT.—That is the same thing I ruled on a while ago.

Thereupon the witness was excused.

Testimony of D. B. Driskill, in His Own Behalf (Recalled).

D. B. DRISKILL was called as a witness in his own behalf, and having been first duly sworn, testified as follows:

Direct Examination.

My name is D. B. Driskill. I am the defendant in this case. The trunk here marked Exhibit "B" in this case is not my trunk. I have never had possession of that trunk. None of the contents were mine. I have never touched, seen or handled any of the contents of that trunk prior to the time it was taken by the Government. I might have touched the trunk a while ago while I was passing it. I have never moved that trunk or any of its contents. I have never had possession of any of the alleged intoxicating liquor marked as exhibits. I never transported any of that liquor at any place. I never did see any of it prior to the time I came here.

Cross-examination.

I did not see this trunk there in the garage that

(Testimony of D. B. Driskill.)

I know of, nor that barrel that I know of. I passed through the garage there [79] frequently, passing from my place over to Mr. Luttner's place. I never saw the trunk to identify it. There are several other trunks in this garage, I suppose; I can't give you the exact amount, five or six or more. There wasn't no trunk sitting just inside the back door between the door and the corner at that time. There was a barrel there at that time, they had some fruit jars, fruit in it, Mrs. Luttner's fruit. I think there in the corner, the southwest corner. That would be the corner to the southwest of the door. I saw that. That was there that morning. Nothing was between that barrel and the door, not a thing.

Thereupon the witness was excused, and the defendant rested.

The Court in its instructions instructed the jury that there is not testimony to show that the defendant transported liquor, and instructed to return a verdict of not guilty as to the transportation, which was done.

I, the undersigned, Judge before whom the foregoing cause was tried, do hereby certify that the statement contained "Bill of Exception No. 1" and "Bill of Exception No. 2" contains the substance of the testimony submitted upon the issues raised upon the trial together with the objections made and the rulings of the Court thereon.

Dated this 31 day of Dec. 1921.

JEREMIAH NETERER,
Judge Presiding. [80]

In the District Court of the United States for the District of Arizona.

No. 1323—C.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID B. DRISKILL,

Defendant,

Affidavit of Service of Bills of Exception.

State of Arizona,
County of Maricopa,—ss.

Spencer B. Pugh, being duly sworn, on his oath, deposes and says that he is the attorney for the defendant in the above-entitled cause; that on the 29th day of November, 1921, he served the attached bills of exception numbered 1 and 2, by leaving true copies thereof with Mr. J. H. Langston, Assistant United States District Attorney, at the office of the United States District Attorney, at Phoenix, Arizona.

That no amendments whatsoever have been proposed by the said United States District Attorney, and no objections presented to the form or substance of the same or served upon affiant.

SPENCER B. PUGH.

Subscribed and sworn to before me this 19th day of December, 1921.

My commission expires Sept. 5, 1922.

L. J. COX,
Notary Public. [81]

[Endorsements]: Phoenix—1323-C. In the District Court of the United States for the District of Arizona. The United States of America, Plaintiff, vs. David B. Driskill, Defendant. Bill of Exceptions. [82]

In the District Court of the United States, District of Arizona.

No. 1323.

UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Petition for Writ of Error.

Now comes David B. Driskill, defendant herein, by his attorney, and says that on the 2d day of November, 1921, the Court entered judgment herein against this defendant, in which judgment and proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be

sent to the Circuit Court of Appeals aforesaid.

SPENCER B. PUGH,
Attorney for Defendant. [83]

[Endorsements]: No. 1323. U. S. Court, District of Arizona. United States of America, vs. David B. Driskill, Defendant. Petition for Writ of Error. Filed Nov. 20, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. Spencer B. Pugh, Attorney for Defendant. [84]

In the District Court of the United States in and for the District of Arizona.

No. 1323.

UNITED STATES OF AMERICA,

vs.

DAVID B. DRISKILL,

Defendant.

Assignment of Errors.

Now comes David B. Driskill, defendant in the above-entitled cause, by his attorney, in connection with his petition for a writ of error herein, and makes the following assignment of errors which he alleges occurred upon the trial of said cause:

1. The trial Court erred in admitting incompetent evidence to this defendant's prejudice, in this, to wit:

The Court admitted in evidence certain bottles of alleged intoxicating liquor, being one bottle labeled as "saffel," one bottle "tequila," and a

quantity of alleged "white mule," and any and all liquor, bottles and receptacles introduced in evidence in said cause, same having been objected to by the defendant upon the ground that all of said liquor and property had been procured and obtained by the United States Government unlawfully from the home and premises and dwelling of the defendant without a search-warrant as required by law and in violation of the constitutional rights of the defendant as set forth in the petition of the defendant theretofore filed in said cause and one of the files therein.

2. That the trial Court erred in overruling and denying the motion of the defendant, made at the close of the case for the Government, to direct a verdict for the defendant upon the second count and each of the counts of the indictment herein, said motion being made upon the ground that sufficient evidence had not been presented by the Government to make out a *prima facie* case or to justify or support a verdict of guilty.

3. That the trial Court erred in denying the motion for a new trial on behalf of defendant.

SPENCER B. PUGH,
Attorney for Defendant. [85]

[Endorsements]: No. 1323. United States District Court, in and for the District of Arizona. United States of America vs. David B. Driskill, Defendant. Assignment of Errors. Filed Nov. 2, 1921. C. R. McFall, Clerk. By Clyde C. Downing,

Chief Clerk. Spencer B. Pugh, Attorney for Defendant. [86]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, David B. Driskill, as principal, and Louise Driskill, W. C. Daniel and Dora Daniel, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Fifteen Hundred Dollars ($1500.00), to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Dated and signed this 2d day of November, 1921.

Whereas, lately, at the October Term, 1921, of the United States District Court of the District of Arizona, in a suit pending in said court between the United States of America, plaintiff, and David B. Driskill, defendant, a judgment was rendered and sentence pronounced against the said David B. Driskill, and the said David B. Driskill has obtained a writ of error from the United States Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, sixty days

from and after the date of said citation, which citation has been duly served.

NOW, the condition of the above obligation is such that, if the said David B. Driskill shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court and shall prosecute said writ of error and shall abide by and obey all orders made by the United States Court of Appeals for the Ninth Circuit in said cause and shall pay any fine and costs imposed by the judgment of the District Court against him, and shall surrender himself in execution of the judgment and sentence against him appealed from as the Court may direct, if the judgment and sentence against him shall be affirmed or the writ of error is dismissed; and if he shall appear for trial in the District [87] Court of the United States for the District of Arizona on such day or days as may be appointed for a retrial of the said cause by said District Court, and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit; then the above obligation to be void; otherwise to remain in full force, virtue and effect.

DAVID B. DRISKILL,
Principal.
LOUISE C. DRISKILL.
A. C. DANIEL.
DORA DANIEL.

Approved this 2d day of Nov. 1921.

Judge.

United States of America,
District of Arizona,—ss.

W. C. Daniel, Dora Daniel and Louise C. Driskill, the sureties in the within undertaking, being duly sworn, each for himself and not one for the other, says that he, or she, is worth the sum of Fifteen Hundred Dollars ($1500.00) over and above all his or her just debts and liabilities, and over and above all property exempt by law from execution and forced sale, and that he, or she, is a resident and freeholder within the state of Arizona.

LOUISE C. DRISKILL.
W. C. DANIEL.
DORA DANIEL.

Approved as to sureties, November 2d, 1921.
PATRICK D. MADDEN.
Deputy Clerk.

Subscribed and sworn to before me this 2d day of November, A. D. 1921.

[Seal] PATRICK D. MADDEN,
Deputy Clerk U. S. District Court.

O. K. as to form.

11/2/21.
JOHN H. LANGSTON,
Asst. U. S. Atty. [88]

[Endorsements]: No. 1323. U. S. District Court, District of Arizona. U. S. of America vs. David B. Driskill, Defendant. Appearance Bond on Writ of Error. Filed Nov. 2, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. Spencer B. Pugh, Attorney for Defendant. [89]

Writ of Error from Circuit Court of Appeals to United States District Court for the District of Arizona (Copy).

To the Honorable Judge of the District Court of the United States for the District of Arizona, GREETING:

Because in the record and proceedings as also in the rendition of the judgment, of a cause which is in the District Court before you, between the United States, as plaintiff, and David B. Driskill as defendant, manifest error, it is alleged, has happened, to the great damage of the said David B. Driskill, defendant, as by his complaint appears, we, being willing that error, if any, should be duly corrected, and full, speedy justice done to the parties aforesaid in this behalf, do command, if judgment be given therein, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with the things concerning the same, to the United States *Circuit of* Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit, on the 2d day of Jan-

uary, in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the errors, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 2d day of November, 1921, A. D., and in the one hundred and forty-fifth year of the Independence of the United States.

C. R. McFALL,
Clerk United States District Court, District of Arizona.

By Clyde C. Downing,
Chief Deputy.

Allowed:

JEREMIAH NETERER,
Judge. [90]

Writ of Error from Circuit Court of Appeals to United States District Court for the District of Arizona (Original).

To the Honorable Judge of the District Court of the United States for the District of Arizona, GREETING:

Because in the record and proceedings, as also in the rendition of the Judgment, of a cause which is in the District Court before you, between the United States, as plaintiff, and David B. Driskill as defendant, manifest error, it is alleged, has hap-

pened, to the great damage of the said David B. Driskill, defendant, as by his complaint appears, we, being willing that error, if any, should be duly corrected, and full, speedy justice done to the parties aforesaid in this behalf, do command, if judgment be given therein, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with the things concerning the same, to the United States *Circuit of* Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit, on the 2d day of January, ——, in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the errors, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 2d day of November, 1921, A. D., and in the one hundred and forty-fifth year of the Independence of the United States.

C. R. McFALL,
Clerk United States District Court, District of Arizona.

By Clyde C. Downing,
Chief Deputy.

Allowed:

JEREMIAH NETERER,
Judge. [90½]

[Endorsed]: No. 1323. U. S. District Court, District of Arizona. U. S. of America vs. David B. Driskill, Defendant. Writ of Error. Filed Nov. 2d, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [91]

Return of Writ of Error.

United States District Court,
For the District of Arizona,—ss.

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Ninth Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this the 18th day of January, A. D. 1922.

[Seal] C. R. McFALL,
Clerk United States District Court for District of Arizona.

By Clyde C. Downing,
Chief Deputy. [92]

[Endorsements]: No. 1323. U. S. District Court District of Arizona. U. S. of America vs. David B. Driskill, Defendant. Writ of Error. Filed Nov. 2, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [93]

In the District Court of the United States, in and for the District of Arizona.

No. 1323.

THE UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Citation to Writ of Error (Copy).

To the United States of America, Defendant in Error.

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, California, on the 2d day of January, 1922, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the District of Arizona, wherein David B. Driskill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Circuit Judge of the United States, within said Circuit, this 2d day of November, A. D. 1921.

JEREMIAH NETERER,
U. S. Dist. Judge.

Service of the above citation accepted this —— day of November, 1921, on behalf of the U. S. Government.

_____,

U. S. Attorney.

[Endorsements]: Filed Nov. 2, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

[Seal] Attest: C. R. McFALL,
Clerk.
By Clyde C. Downing,
Chief Deputy Clerk. [94]

In the District Court of the United States in and for the District of Arizona.

No. 1323.

THE UNITED STATES OF AMERICA

vs.

DAVID B. DRISKILL,

Defendant.

Citation to Writ of Error (Original).

To the United States of America, Defendant in Error.

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of appeals for the Ninth Circuit, to be held in the City of San Francisco, California, on the 2d day of January, 1922, pursuant to a writ of error filed in the Clerk's Office of the District Court of

the United States for the District of Arizona, wherein David B. Driskill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable WILLIAM H. TAFT, Circuit Judge of the United States, within said Circuit, this 2d day of November, A. D. 1921.

JEREMIAH NETERER,
U. S. Dist. Judge.

Service of the above citation accepted this —— day of November, 1921, on behalf of the U. S. Government.

_____,
U. S. Attorney.

[Seal] Attest: C. R. McFALL,
Clerk.
By Clyde C. Downing,
Deputy Clerk. [95]

Filed Nov. 2d, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

In the District Court of the United States for the District of Arizona.

No. C-1323—PHOENIX.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID B. DRISKILL,
Defendant.

Praecipe for Transcript of Record.

The clerk of this court is hereby directed to prepare and certify a transcript of the record in the above-entitled case for the use of the United States Circuit Court of Appeals for the Ninth Circuit, by including therein the following:

1. Indictment.
2. Motion to restore property.
3. Motion to strike the same and order thereon.
4. Answer thereto.
5. Verdict and judgment.
6. Motion for new trial.
7. Petition for writ of error.
8. Assignment of errors.
9. Citation thereto, and order thereon.
10. Bail bond pending writ of error.

—and such other papers, records and orders filed and made in connection with the above-entitled case.

Dated this 10th day of Nov. 1921.

SPENCER B. PUGH,
Attorney for Plaintiff in Error.

Service of the within praecipe of record and receipt of a copy is hereby admitted this 10th day of November, 1921.

THOMAS A. FLYNN,
United States Attorney.
By Jos. M. Holub,
Asst. U. S. Attorney. [96]

[Endorsements]: In the District Court of the United States for the District of Arizona. No.

C–1323. United States of America, Plaintiff, vs. David B. Driskill, Defendant. Praecipe for Record.

[Endorsements]: Filed Nov. 10, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. Spencer B. Pugh, Attorney for Plaintiff. [97]

In the District Court of the United States for the District of Arizona.

No. 1323-C—(PHOENIX).

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID B. DRISKILL,
Defendant.

Order Extending Time to File Bill of Exceptions and Transcript of Record (Dated December 2, 1921).

This cause coming on to be heard on this 2d day of December, 1921, upon the motion of the defendant for an extension of time in which to file bills of exceptions and transcript in the office of the Clerk of the United States Court of Appeals,—

IT IS ORDERED that the time in which the above-named defendant may file his bills of exception and transcript with the Clerk of the United States Court of Appeals for the Ninth Circuit is hereby extended for the period of thirty days from this date.

Done at Tucson, Arizona, this second day of December, A. D. 1921.

WM. H. SAWTELLE,

Judge United States District Court for the District of Arizona. [98]

[Endorsements]: No. 1323–C (Phoenix). In the United States District Court for the District of Arizona. The United States of America, Plaintiff, vs. David B. Driskill, Defendant. Order Extending Time for Filing Bill of Exceptions. Filed Dec. 2, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [99]

In the District Court of the United States for the District of Arizona.

No. 1323–C.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID B. DRISKILL,

Defendant.

Order Extending Time to File Bill of Exceptions and Transcrip of Record (Dated January 3, 1922).

This cause coming on to be heard on this 2d day of January, 1922, upon the motion of the above-named defendant for an extension of time in which to file bills of exception and transcript on appeal

in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit,—

IT IS ORDERED that the time within which the above-named defendant may file and cause to be filed his bills of exception and transcript with said United States Court of Appeals for the Ninth Circuit with the Clerk thereof be, and the same is, hereby extended for a period of 15 days from the date hereof.

Done at Phoenix, Arizona, this third day of January, 1922.

FRANK S. DEITRICH,
Judge Presiding in United States District Court for the District of Arizona. [100]

[Endorsements]: No. 1323–C. United States District Court in and for the District of Arizona. United States of America, Plaintiff, vs. David B. Driskill, Defendant. Extension of Time for Filing Bills of Exception and Transcript on Appeal. Filed Jan. 3, 1922. C. R. McFall, Clerk. By P. D. Madden, Deputy. Spencer B. Pugh, Atty. for Defendant. [101]

In the District Court of the United States for the District of Arizona.

No. C–1323—(PHOENIX).

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID B. DRISKILL,
Defendant.

Order Extending Time to File Transcript of Record (Dated January 17, 1922).

It appearing that the extensions heretofore granted will be insufficient within which the Clerk of the above court can prepare and forward for filing to the United States Circuit Court of Appeals for the Ninth Circuit, the transcript of record called for in the praecipe directed to the said Clerk, the said record being submitted upon writ of error allowed in the above cause,—

IT IS HEREBY ORDERED that the time within which said record shall be filed with the Clerk of the said United States Circuit Court of Appeals for the Ninth Circuit, be extended for a period of five days from January 17th, 1922, the date upon which the time would expire if an extension were not made thereof.

Dated this 17th day of January, A. D. 1922.

FRANK S. DIETRICH,

Judge (Presiding) of the United States District Court, District of Arizona.

Filed Jan. 17, 1922. C. R. McFall, Clerk. By Clyde C. Downing, Deputy. [102]

In the District Court of the United States for the District of Arizona.

No. C–1323 (PHOENIX).

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID B. DRISKILL,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said court, including the records, papers and files in the case of the United States of America, Plaintiff, vs. David B. Driskill, Defendant, said case being numbered C–1323 (Phoenix) on the Criminal Docket of said court.

I further certify that the foregoing 103 pages, numbered from 1 to 103, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such clerk.

And I further certify that there is also annexed

to said transcript the original writ of error and the original citation issued in said cause.

I further certify that the cost of the preparing and certifying to said record, amounting to Thirty and no/100 Dollars ($30.00), has been paid to me by the above-named defendant.

WITNESS my hand and the seal of said court this 14th day of January, 1922.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States for the District of Arizona.

By Clyde C. Downing,
Chief Deputy Clerk. [103]

[Endorsed]: No. 3829. United States Circuit Court of Appeals for the Ninth Circuit. David B. Driskill, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed January 20, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

3829

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID B. DRISKILL, *Plaintiff in Error,* *vs.* THE UNITED STATES OF AMERICA, *Defendant in Error.*	}	No. ~~3829.~~

BRIEF OF PLAINTIFF IN ERROR

FILED
APR 17 1922
F. D. MONCKTON,
CLERK

SPENCER B. PUGH,
Attorney for Plaintiff in Error.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID B. DRISKILL, *Plaintiff in Error,*	⎫	
vs.	⎬	No. 3839.
THE UNITED STATES OF AMERICA, *Defendant in Error.*	⎭	

BRIEF OF PLAINTIFF IN ERROR

SPENCER B. PUGH,
Attorney for Plaintiff in Error.

STATEMENT OF THE CASE

David B. Driskill, plaintiff in error, was indicted by the Grand Jury of the District Court of the United States for the District of Arizona on the 27th day of April, 1921, charged in one count with the possession of intoxicating liquor in violation of Section 3, Title 2, Act of Oct. 28, 1919, and in a second count with the transportation thereof, (Tran., p. 1). Trial was had on Oct. 29, 1921, and the jury returned its verdict of guilty as to the first count and not guilty as to the second. (Trans., p. 17.)

Thereupon the Court entered judgment and sentence that plaintiff in error pay a fine of Five Hundred Dollars and Ninety-Four Dollars costs. (Tran., p. 18.) Motion for new trial was filed and denied (Tran., p. 20), and writ of error sued out of this Court.

The intoxicating liquor for the possession of which the plaintiff in error was convicted consisted of seven pints of whiskey, nine pints of tequila and one gallon of other intoxicating liquor, all being stored in an outhouse upon premises belonging to plaintiff in error and under lease from him to a tenant and being under the joint occupancy of the landlord and the tenant, each using it for the storage of different articles from their dwellings. This outhouse was searched without any search warrant by several officers under the charge and direction of Fred Weage, Deputy U. S. Marshall, and E. B. Sisk, an agent of the Department of Justice, and the liquor procured as evidence.

Prior to the trial, plaintiff in error filed his petition, accompanied by his affidavit (Tran., p. 6), asking that said liquor be restored and that the officers be restrained from using same or any information secured from the search therefor, alleging that the outbuilding in which said liquor was found was in the joint possession and occupancy and use as a storehouse by plaintiff in error and his family and the tenant of the adjoining dwelling and premises; that the officers of the Government entered same

without the consent of plaintiff in error and without any search warrant therefor in violation of the constitutional rights of petitioner. Issue was taken by the Government by its answer denying the use of the said premises by petitioner as a storehouse in connection with his dwelling (Tran., p. 13), and the issue was tried as an issue of fact upon the trial. Objections were made to the admission of the liquor in evidence upon the grounds set out in the petition (Tran., p. 33), and at the conclusion of the testimony upon this issue (Tran. p., 81), the Court denied the petition and overruled the objections to the admission of such evidence. This was presented by motion for new trial (Tran., p. 21). Exceptions were taken and this action of the Court is one of the errors relied upon by plaintiff in error. (Tran., p. 101.)

At the close of the case for the Government, the plaintiff in error moved the Court for a pre-emptory instruction for the defendant upon the ground that insufficient evidence had been introduced to make out a primae facie case (Tran., p. 94), which motion was denied. This alleged error was presented to the Court on motion for new trial (Tran., p. 21), and as set out in Assignments 2 and 3 of the Assignment of Errors is the second ground of error relied upon by plaintiff in error,

SPECIFICATION OF ERRORS

The specific errors relied upon and presented

by the plaintiff in error for reversal are as follows, each of such errors having been presented to the Trial Court by motion for new trial and set up in the Assignment of Errors, as set out in the foregoing Statement of the Case:

1. The Court erred in admitting in evidence certain bottles of intoxicatin liquor, being one bottle labeled as "Saffel", one bottle "Tequila" and a quantity of alleged "white mule,,' and any and all liquor, bottles and receptacles introduced in evidence in said cause, same having been objected to by the plaintiff in error upon the ground that same had been procured and obtained by the Government unlawfully from the home and premises and dwelling of the plaintiff in error without a search warrant as required by law and in violation of his Constitutional rights as set forth in his petition to restrain the use of the same as evidence.

2. That the Trial Court erred in overruling the motion of plaintiff in error made at the close of the case of the Government, to direct a verdict for the defendant upon the ground that the Government had failed to make out a primae facie case or introduce sufficient evidence to support a verdict of guilty.

ARGUMENT ON FIRST SPECIFICATION OF ERROR

Plaintiff in error contends that the testimony

introduced by the Government and the defendant, upon the issue presented by the defendant's petition to exclude the liquor upon the ground of unlawful search and the answer thereto, shows conclusively that the premises of the plaintiff in error were so connected with his dwelling as to come within the inhibition of unlawful search.

The contention is, (1) that the search was made by Government officers and under their direction, (2) that there was no consent thereto by the defendant, (3) that the outbuilding wherein the evidence was found was occupied by the plaintiff in error and his family as a necessary part of their dwelling, and (4) that there was no search warrant.

The Officers making the search included E. B. Sisk, agent of the Department of Justice, and Fred Weage, Deputy U. S. Marshall. They were in charge of Mr. Weage (Transcript. p. 61.)

There was no consent to the search, as shown by the testimony of the Deputy Marshall, who explains that the defendant objected and became abusive (Tran., p. 61). The witness does state (Tran., p. 62), that the wife of defendant stated that she had no objection to the search. However, it is held in Amos vs. U. S., 255 U. S. Rep. 313, that the wife can not waive the constitutional right of the husband in this respect.

The proof that the premises from which the incriminating evidence was taken was a part of the dwelling of the plaintiff in error and his family is

conclusive. W. H. Luttner testifies that the possession of this building was a joint possession between himself as tenant of the adjoining premises and of Driskill, each to use it as a place of storage. (Tran., p. 46.) Mrs. W. H. Luttner testifies that Driskill put up the garage and told her that they could use it with him and that Driskill had been using it ever since that time as a storage room (Tran., p. 40). Driskill, plaintiff in error, testifies that he put up the garage and that it was arranged that the Luttners might use it along with his family and that no specific corners were allotted to either and that each family put their stuff in there (Tran., p. 50). The same place was referred to by Mrs. Driskill as the "backshed". No other witness testified as to the ownership or occupancy of this outbuilding or garage.

That there was no search warrant for these premises is admitted by all the Government witnesses. While the officers went to the Driskill home with a search warrant, the house was wrongly numbered, and the Deputy Marshall Weage states that same was not served. He states (Tran., p. 62), "So I called by assistants off, told them I could not serve that warrant, as a mistake had been made in the warrant."

The Trial Court, judging by his remarks upon the denial of plaintiff in error's motion to exclude this evidence (Tran., p. 81), seems to have wrongfully assumed that this search and discovery was

not made by Government representatives, notwithstanding the conclcusive testimony above quoted on that point. The Court further stated in the opinion (Tran., p. 82), that in his opinion "the garage in which these articles were found was not a part of the premises of the defendant:", though as above shown every witness testifying on that point stated the contrary. The Trial Court further states as one of the grounds for his decision that there is no evidence that the "defendant claims this to be his property,,' (Tran., p. 83), though the decisions have been to the effect that the defendant has the right to assert under the 4th Amendment to the Constitution as the use of such evidence compels him to be an unwilling witness against himself and that the claim to the property so taken is not essential to the prevention of its use as evidence. U. S. vs. Slusser, 270 Fed. 818. Gouled vs. U. S., 255 U. S. Rep. 298, Amos vs. U. S., 255 U. S. Rep. 313. And the Trial Court as a further ground for such ruling states (Tran., p. 84), in substance, that the defendant had failed to assert his constitutional right until after the case had been pending for several months and had been set for trial. Yet the U. S. Supreme Court held in the case of Amos vs. U. S., that such a motion was not too late when made even after the jury had been sworn to try the case.

It seems to us that in view of the overwhelming evidence in favor of the defendant upon these points, and the misapprehension of the Court as to the facts

proven and the law as laid down in the cases above cited, the motion should have been sustained and the evidence excluded.

ARGUMENT ON SECOND SPECIFICATION OF ERROR

The motion of plaintiff in error for an instructed verdict was made at the close of the Government's case and also at the close of all the evidence in the cause. The Court having held, in his decision denying the motion to exclude the introduction of the liquor in evidence, that "the garage in which these articles were found was not a part of the premises of the defendant: they belonged to the premises which had been leased to another party," it becomes interesting to note what new evidence is introduced in that behalf or to connect the defendant with the possession of the liquor with the possession of which he was convicted.

Certainly, to justify the Court in submitting this matter to the jury, there must have been either a finding of this liquor on defendant's premises under conditions from which a reasonable inference could be drawn that he had knowledge of it, or, if not on his premises, some showing of personal possession by him.

The only evidence counsel can find in the transcript as to any personal connection of the defend-

ant, or which could by any reasonable flight of the imagination be construed as personal connection, is in the bill of exceptions No. 1 (Tran., p. 34), in the testimony of Sisk in which he says: "I looked across into the garage across the alley from the defendant's premises, and the defendant was stooping, had hold of a trunk, and in the act of pushing it back into a corner." There was nothing to show this was the trunk containing liquor, and it was admitted and claimed all through the trial that the defendant did store property here as well as others.

Bill of Exceptions No. 2 contains nothing whatever in addition to the above mentioned testimony of Sisk, which is repeated on the main issue, and counsel submits that there is nothing in this record in the way of testimony to submit to the jury; nothing to show the possession of this liquor by the defendant to the exclusion of other persons; nothing to warrant the Court in submitting or to sustain the verdict of the jury.

GENERAL ARGUMENT

The record shows, when read in the light of human experience, that the plaintiff was convicted of this crime because an array of bottles of intoxicating liquor was admitted in evidence and placed before the jury with the testimony that they were procured at the time of the arrest of the defendant

from a garage in or near his premises. In admitting this evidence the Court ruled as a matter of law that the premises were not that of the defendant. Then, without additional substantial testimony, the Court submitted to the jury the question of the defendant's possession of the liquor.

It seems that the case of the Government was such that in order to excuse an unlawful search it was held to have proven that the illegal articles were not in the possession of the defendant or in premises with which he had any thing to do or over which he had any control; and in order to have the cause submitted to the jury, the Court in effect held, and must necessarily have held in order to make an issue for the jury, that the possesison was that of the dedenfant. We submit that both of these contentions can not be true; that if one is true, then it must follow that the other is false.

We therefore submit that the Court erred in denying the defendant's motion to exclude the illegal articles from the evidence and in submitting the matter to the jury at the close of the Government's case, and respectfully submit that the cause should be reversed, with direction that it be dismissed or other appropriate order.

Respectfully submitted,

SPENCER B. PUGH,

Attorney for Plaintiff in Error.

—IN THE—

United States Circuit Court of Appeals for the Ninth Circuit

DAVID B. DRISKILL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 3829

Brief of Defendant in Error

FREDERICK H. BERNARD,
United States Attorney for the District of Arizona.

FRANCIS D. CRABLE,
Assistant United States Attorney for the District of Arizona.

Filed this day of, 192....

FRANK D. MONCTON, Clerk,

By Deputy Clerk.

FILED
MAY 1 - 1922
F. D. MONCKTON, CLERK

BOWER CO., PHOENIX

—IN THE—

United States Circuit Court of Appeals for the Ninth Circuit

DAVID B. DRISKILL,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 3839.

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

Plaintiff in Error, who hereafter in this brief will be referred to as defendant, lived at 2248 West Washington Street, in the City of Phoenix, Arizona, with his family. Search warrant was secured for purpose of searching his residence for intoxicating liquors, and a Deputy United States Marshal, together with Special Agents of the Department of Justice, assisted by City Officers, went to the house to make search. Upon arriving at the house of defendant it was discovered that the search warrant contained a different number

than that of the residence of defendant. Upon this discovery being made, further search of said residence was deferred. Defendant Driskill also owned a house and lot across the alley and to the rear of his residence, which he had, nearly two years before the date of the search, rented to the Luttner family. On the morning of the search Special Agent Sisk saw the defendant pushing a trunk into the garage across the alley from defendant's home, and on the premises rented to Luttner, at a point where the trunk containing intoxicating liquors involved in evidence in this case was found, and Special Agent Sisk then secured permission from Mrs. Luttner to make a search of the garage, and found the intoxicating liquors and receptacles therein. Defendant Driskill, the same morning or the morning previous to the search, and before the search, had requested permission of Mrs. Luttner to place a trunk in the garage on the Luttner premises.

Defendant Driskill was indicted upon two counts and convicted upon one, as stated in brief of plaintiff in error.

ARGUMENT.

But two assignments of error are made by counsel for plaintiff in error, first, that the Court erred in admitting in evidence the intoxicating liquor, bottles and receptacles, for the reason that the same were unlawfully seized from the premises and dwelling of the defendant. It will be noted that nowhere in the record is it made to appear that the defendant ever claimed the property so alleged to have been unlawfully taken from him without a search warrant.

There could be no unlawful or unreasonable search and seizure even though the premises of defendant below had been searched and property taken therefrom that belonged to another and not to the defendant. The Constitution of the United States only protects a person from unreasonable searches and seizure of his OWN property.

A petition for the return of the property taken from the garage on the Luttner premises was filed by defendant (Tr. 6), but nowhere in the petition was it alleged that the property so taken was the property of the defendant. Nor was there any evidence introduced to show such a fact. Issues were joined and a hearing before the Court had, and the trial Court found as a fact that the intoxicating liquors and other exhibits offered and received in evidence on the trial of defendant were taken from a garage on premises not a part of the premises of the defendant (Tr. 82), but that the garage belonged to the premises that had been leased to the Luttners. The Court having found this fact from the evidence before him, the Appellate Court will not disturb that finding of fact unless it is plainly shown by clear and positive proof that the finding of the Court was clearly against the weight of the testimony which is not made to appear in this record. The trial Judge, having the witnesses before him, is in a better position to judge as to the credibility of the witnesses and the weight that should be given to their testimony. This is so elementary as to need no citation of authorities, but a few are here submitted.

Dooley vs. Pease, 88 Fed. 446.
Dickey vs. Dickey, 94 Fed. 331.
Boardman vs. Toffey, 117 U. S. 271.
Stanley vs. County of Albany, 121 U. S. 535.
Keokuk & H. Bridge Co. vs. People State Ills., 175 U. S. 626.
Willard vs. Carrigan, 8 Ariz. 70 (68 Pac. 538).
Abanathy vs. Reynolds, 8 Ariz. 173 (71 Pac. 914).

It is conceded that the officers making the search and seizing the intoxicating liquors and other exhibits in evidence had no search warrant. Ample proof was adduced (Tr. 39-41) at the trial, and the trial Court found that (Tr. 82) none was necessary, permission to search the garage where the liquor was found by the officers having been given by Mrs. Luttner who was tenant of defendant in possession of the garage wherein the liquor was found. It is true that defendant owned the premises, but the same had been leased by him to the Luttner family, and the fact that he did not consider that he had joint control of the premises with the Luttner family is shown by the testimony which is not disputed by the defendant—that the defendant had, on the morning of the search or the morning previous to the search and seizure of the liquor, gone to the residence of Mrs. Luttner and secured her permission to put a trunk in the garage (Tr. 39). And such permission was given the defendant by Mrs. Luttner (Tr. 39-41). Mr. Luttner, in his testimony (Tr. 48), testified that he had leased the garage to one John Houston for the storage of some articles therein, and that Houston had agreed to pay him the rent therefor. There is no testimony in the record that defendant was ever given any part of that rent, nor that he ever asked for it, which also tends to disprove the claim that defendant had joint control

with Luttner of the garage wherein the intoxicating liquor was found.

Seasonable application was not made for the return of the intoxicating liquor and other property seized:

Weeks vs. U. S., 232 U. S., 383, 384.

Counsel for plaintiff in error in his brief at page 7 urges that the cases of

U. S. vs. Slusser, 270 Fed. 818;
Gouled vs. U. S., 255 U. S. 298, and
Amos vs. U. S., 255 U. S. 313,

are authority on the question of the unlawful search and seizure, and that the Amos case is authority upon the question of the seasonability of the application for the return of the property.

The Slusser case is not in point for the reason that in that case a garage on the premises of the residence of the defendant had been searched, while in the instant case the garage searched was upon the premises of the Luttners, and permission to make such search was secured from Mrs. Luttner. In the Gouled case prompt application had been made upon the first notice the defendant had of the seizure of his papers, while in the instant case the search and seizure was made on the 23rd day of April, 1921. and he was indicted, arraigned and entered his plea on the 27th day of April, 1921, and the application on return of property seized was not made until the 24th day of October, 1921. In the Amos case the property was taken from the defendant's home without any search warrant, and permission by the wife of de-

fendant to make the search was relied upon as obviating or waiving the necessity for a search warrant, while in the instant case no such state of facts exists. And in the Amos case there was no conflict in the evidence as to how the search and seizure had been made, the Government witnesses having described how the search was made of defendant's home without warrant either to arrest him or search his premises.

Counsel for plaintiff in error contends in his second assignment of error that the Court erred in overruling the motion of defendant for directed verdict, on the ground that the Government had not made a prima facie case. There was ample proof that the intoxicating liquors and bottles and other containers or receptacles had been taken from the garage which defendant claimed in his petition for the return of the property so taken was taken from his possession. Aside from the evidence of witnesses for the Government that the same was taken from the possession of defendant, he also alleges in his said petition that the property was taken from his possession, even though he does not claim the ownership of the property. This was sufficient to warrant the trial Court in submitting to the jury the question of whether or not the defendant had possession of the intoxicating liquors.

Mrs. Luttner testified (Tr. 39), "Driskill asked me if he could put a trunk in the shed and I said he could —that was before the trunk was put in there. The trunk and the barrel and bottles were taken away that day * * * think they were taken away by the officers. I had some conversation with Mr. Driskill about that time about this trunk and barrel. He was arrested then. He was arrested that day, and I think after he was released, why I went over there, and he told me he had been arrested, and how it was and all

that. He said something to me about a trunk and barrel being taken out of the shed or building. He said that they had found some liquor in it. He said, 'Did you leave them take it out?' and I said 'Yes'. He didn't say anything more about it then." The defendant testified he had access to the garage (Tr. 51). Deputy Marshal Weage testified (Tr. 63) "I took possession of the trunk and barrel after Mr. Sisk had handed it over to me. I saw where he got the trunk and barrel. He got it in this garage or barn opposite Driskill's place across the alleyway, directly in the rear, the place that belonged to Mrs. Luttner. The truck was ordered and I accompanied the truck driver with the barrel and the trunk and contents, and brought it to our office up here. At the time the barrel was taken out of the garage, the barrel and trunk, Mr. Driskill was sitting there in the car that Mr. Sisk had. The car was about one hundred feet up the alleyway from the garage. The trunk and barrel were loaded on the truck right in back of the garage as near the door as it was possible to get it. That was in plain view of the car where Mr. Driskill sat."

Mr. Sisk, in his testimony, (Tr. 76), testified defendant was pushing the trunk into the Southwest corner of the garage and in plain view. Also (Tr. 77) "He was pushing the trunk west against the corner wall. * * * the trunk was inside the door at the time but right on the door line and he was pushing it against the west wall."

We submit that the testimony quoted, together with the testimony of H. L. Goss (Tr. 93), furnishes sufficient justification for the Court to submit the ques-

tions of fact to the jury upon the charge of illegally possessing intoxicating liquor.

We respectfully submit that the judgment of the trial Court should be affirmed.

Respectfully submitted,

FREDERICK H. BERNARD,
United States Attorney for the
District of Arizona.

FRANCIS D. CRABLE,
Assistant United States Attorney
for the District of Arizona.

No. 3830

United States

Circuit Court of Appeals

For the Ninth Circuit.

14

In the Matter of GEORGE R. JESSEE, Bankrupt.

J. F. HERRICK, as Trustee of the Estate of GEORGE R. JESSEE, Bankrupt,
Petitioner and Appellant,
vs.
FIRST NATIONAL BANK OF COLVILLE, WASHINGTON, a Corporation,
Respondent and Appellee.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Eastern District of Washington, Northern Division and Upon Appeal from Said District Court.

FILED
MAR 4 - 1922
F. D. MONCKTON,
CLERK.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3830

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of GEORGE R. JESSEE, Bankrupt.

J. F. HERRICK, as Trustee of the Estate of GEORGE R. JESSEE, Bankrupt,

Petitioner,

vs.

FIRST NATIONAL BANK OF COLVILLE, WASHINGTON, a Corporation,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Eastern District of Washington, Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY—No. 3532.

In the Matter of GEORGE R. JESSEE, Bankrupt.
J. F. HERRICK, as Trustee in Bankruptcy of GEORGE R. JESSEE, Bankrupt,

Appellant,

vs.

FIRST NATIONAL BANK OF COLVILLE, WASHINGTON, a Corporation,

Appellee.

Petition to Revise in Matter of Law.

To the Honorable Judges of the Circuit Court of Appeals of the Ninth Circuit of the United States:

Your petitioner respectfully shows.

I.

That he is the duly qualified and acting Trustee of the Estate of George R. Jessee, Bankrupt, who was so adjudged a bankrupt in the District Court of the United States, for the Eastern District of Washington, Northern Division, on the 14th day of January, 1921.

II.

That after such adjudication, the following proceedings were had in the case of the said bankrupt:

The trustee filed a petition to set aside a certain chattel mortgage given by the bankrupt to the First National Bank of Colville, Washington, for the sum of Thirty-six Hundred and Seventeen (3617.00)

Dollars, covering two Elcar automobiles. That the facts are undisputed, and are as follows:

On November 17th, 1921, the bankrupt gave to the First National Bank of Colville a chattel mortgage for Thirty-six Hundred and Seventeen Dollars ($3617.00), covering two automobiles. At that time the First National Bank of Colville advanced the full purchase price of the automobiles in question and the mortgage was given for the purpose of securing the purchase price thereof. On the 18th day of November, 1920, the mortgage was filed in the office of the Auditor of Stevens County, Washington, in which County the automobiles were kept.

The notary did not sign the affidavit of good faith. He did, however, attach his seal opposite the place where his signature should have been. The affidavit of good faith is followed on the instrument, by the acknowledgment and the acknowledgment is in proper form. Undisputed oral testimony was admitted over objection, that the mortgagor (the bankrupt herein) swore to the affidavit of good faith.

The mortgage was a single sheet of paper, with the blank form for the affidavit and acknowledgment on the back thereof.

The sole question involved is, whether or not the mortgage is valid as against the Trustee.

III.

That on the first day of September, 1921, an order was made by Sidney H. Wentworth, Esq., Referee in Bankruptcy to whom the above-entitled

matter has been referred, adjudging said chattel mortgage to be void as against the Trustee, and on the 19th day of January, 1922, an order was granted and entered by the Hon. Frank H. Rudkin, District Judge of the United States for the Eastern District of Washington, Northern Division, reversing the order of the Referee and adjudging said chattel mortgage to be valid as against the Trustee, a copy of which order is hereto annexed.

IV.

That said order was erroneous in the matter of law, in that the Court erred as follows:

1. In reversing the order of the Referee made and entered adjudging the mortgage of the First National Bank of Colville void as against the Trustee.

2. In refusing to affirm the order of the Referee made and entered, adjudging the mortgage of the First National Bank of Colville to be void as against the Trustee.

3. In adjudging the chattel mortgage to the the First National Bank of Colville to be valid as against the Trustee.

4. In failing to adjudge the chattel mortgage of the First National Bank of Colville void as against the Trustee.

5. In reversing the order of the Referee ordering the return of the property covered by said chattel mortgage, or the proceeds thereof, to the Trustee.

6. In failing to affirm the order of the Referee ordering the return of the property

covered by said chattel mortgage to the Trustee.

7. In denying that the Trustee is entitled to the property covered by said chattel mortgage, free and clear of the lien thereof.

WHEREFORE, your petitioner, feeling aggrieved because of such order, asks that the same may be revised in the matter of law by your Honorable Court, as provided in Section 24–b of the Bankruptcy Law of 1898, as amended, and the rules and practice in such case provided.

J. F. HERRICK,
Petitioner.
FABIAN B. DODDS,
Attorney for Petitioner.

State of Washington,
County of Spokane,—ss.

J. F. Herrick, being first duly sworn, deposes and upon his oath says: I am the Trustee above named; I have read the foregoing petition, and the statement of facts therein contained is true, according to the best of my knowledge, information and belief.

J. F. HERRICK.

Subscribed and sworn to before me this 19th day of January, 1922.

[Seal] FABIAN B. DODDS,
Notary Public for the State of Washington, Residing at Spokane.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

IN BANKRUPTCY—No. ——.

In the Matter of GEORGE R. JESSEE, Bankrupt.

ORDER.

This cause having heretofore come on for hearing before Hon. Frank H. Rudkin, Judge of the above-entitled Court, on the petition of the First National Bank of Colville, for a writ of review from the order of Sidney H. Wentworth, Esquire, Referee in Bankruptcy, adjudicating void a certain mortgage on two automobiles given by the bankrupt to the First National Bank of Colville, Washington, on November 17th, 1920, the mortgagee being represented by L. B. Donley and Allen, Winston & Allen, its attorneys, and the Trustee being represented by Messrs. Dodds & Dodds, his attorneys, and the Court having filed his opinion herein, it is by the Court

ORDERED, ADJUDGED and DECREED that the said order of the Referee be and the same is hereby reversed and the said mortgage of the bank be and the same is hereby declared to be valid. Exception of Trustee allowed.

Dated at Spokane, Washington, this 19th day of January, 1922.

FRANK H. RUDKIN,
District Judge.

[Endorsed]: No. 3830. United States Circuit Court of Appeals, for the Ninth Circuit. In the Matter of George R. Jessee, Bankrupt. Petition to Revise in the Matter of Law. Filed Jan. 23, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Due service of the within petition acknowledged this 19th day of December, 1921.

L. B. DONLEY,
ALLEN, WINSTON & ALLEN,
Attorneys for First National Bank of Colville.

United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY—No. 3532.

In the Matter of GEORGE R. JESSEE, Bankrupt.
J. F. HERRICK, as Trustee in Bankruptcy of GEORGE R. JESSEE, Bankrupt,
Appellant,

vs.

FIRST NATIONAL BANK OF COLVILLE, WASHINGTON, a Corporation,
Appellee.

Stipulation.

IT IS HEREBY STIPULATED by and between the parties hereto that the record made up on the appeal in the above-entitled matter may be used and become a part of the proceedings under

the petition to revise in the matter of law, filed herein;

In case the Circuit Court of Appeals, for the Ninth Circuit should hold that the remedy is not by appeal but by petition to revise in the matter of law.

Dated this 19th day of January, A. D. 1922.

FABIAN B. DODDS,
Attorney for Appellant.

L. B. DONLEY,
ALLEN, WINSTON & ALLEN,
Attorneys for Appellee.

[Endorsed]: No. 3830. United States Circuit Court of Appeals for the Ninth Circuit. In the matter of George R. Jessee, Bankrupt. Stipulation. Filed Jan. 23, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3830.

In the Matter of GEORGE R. JESSEE, Bankrupt.
J. F. HERRICK, as Trustee in Bankruptcy of GEORGE R. JESSEE, Bankrupt,
Appellant,

vs.

FIRST NATIONAL BANK OF COLVILLE, WASHINGTON, a Corporation,
Appellee.

Notice of Filing Petition for Revision, etc.

To the First National Bank of Colville, Washington, and to Allen, Winston & Allen, and L. B. Donley, of Colville, Washington, Its Attorneys.

You and each of you will please take notice that on the 23d day of January, A. D. 1922, a certain petition for revision under Section 24B of the Bankruptcy Act of Congress approved July 1, 1898, of certain proceedings of the District Court of the United States for the Eastern District of Washington, Northern Division, (a certified copy of which petition accompanies this notice, and is served upon you herewith), was duly filed in the said Circuit Court of Appeals; and the above-mentioned matter is now pending in said court and, pursuant to the practice and agreeably to the provisions of Rules 35 and 36 will be regularly assigned for hearing or submission during the May session of said court to be held in the city of San Francisco in the State of California commencing on May 1, 1922.

WITNESS, THE HONORABLE THE JUDGES of the United States Circuit Court of Appeals for the Ninth Circuit, and the seal of said Circuit Court of Appeals at the city of San Francisco in the State of California, this 23d day of January, A. D. 1922.

[Seal]

F. D. MONCKTON,
Clerk,
By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: No. 3830. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of George R. Jessee, Bankrupt. J. F. Herrick, as Trustee in Bankruptcy of George R. Jessee, Bankrupt, Appellant, vs. First National Bank of Colville, Washington, a Corporation, Appellee. Notice of Filing Petition for Revision, etc. Filed Feb. 11, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Service acknowledged this 8th day of February, 1922.

ALLEN, WINSTON & ALLEN,
L. B. DONLEY,
Attorneys for 1st Nat'l Bank of Colville.

No. 3830

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of GEORGE R. JESSEE, Bankrupt,

J. F. HERRICK, as Trustee of the Estate of GEORGE R. JESSEE, Bankrupt,

Appellant,

vs.

FIRST NATIONAL BANK OF COLVILLE, WASHINGTON, a Corporation,

Appellee,

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Names and Addresses of Attorneys of Record.

L. B. DONLEY, Colville, Washington, ALLEN, WINSTON & ALLEN, Paulsen Bldg., Spokane, Washington,

Attorneys for The First National Bank of Colville.

FABIAN B. DODDS, Old National Bank Bldg., Spokane, Washington,

Attorney for the Trustee in Bankruptcy.

[1*]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3532—IN BANKRUPTCY.

In the Matter of GEORGE R. JESSEE, Bankrupt.

Stipulation and Agreed Statement.

In conformity with Equity Rule No. 77, the following is a statement of the case and shall be treated as superseding for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, to wit:

On November 17th, 1921, the bankrupt gave to the First National Bank of Colville a chattel mortgage for Thirty-six Hundred and Seventeen Dollars ($3617.00), covering two automobiles. At that

*Page-number appearing at foot of page of original certified Transcript of Record.

time, the First National Bank of Colville advanced the full purchase price of the automobiles in question and the mortgage was given for the purpose of securing the purchase price thereof.

On the 18th day of November, 1920, the mortgage was filed in the office of the Auditor of Stevens County, Washington, in which County the automobiles were kept.

The notary did not sign the affidavit of good faith. He did, however, attach his seal opposite the place where his signature should have been. The affidavit of good faith is followed on the instrument by the acknowledgment and the acknowledgment is in proper form, signed by the notary, and his seal placed thereon. Undisputed oral testimony was admitted over objection, that the mortgagor (the bankrupt herein) [2] swore to the affidavit of good faith.

The mortgage was a single sheet of paper with the blank form for the affidavit and acknowledgment on the back thereof.

The petition in bankruptcy was filed December 28th, 1920 and adjudication made January 14th, 1921, and J. F. Herrick qualified as Trustee January 29th, 1921, and is now the Trustee of said estate.

The sole question involved is, whether or not the mortgage is valid as against the Trustee in Bankruptcy.

The foregoing stipulation and agreed statement signed and dated at Spokane, Washington, this 19th day of January, A. D. 1922.

(Signed) FABIAN B. DODDS,
Attorney for Trustee.
L. B. DONLEY,
Attorney for First National Bank of Colville.
ALLEN, WINSTON & ALLEN,
Attorneys for First National Bank of Colville.

Approved:

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Stipulation and Agreed Statement. Filed in the U. S. District Court for the Eastern District of Washington. January 19, 1922. W. H. Hare, Clerk. By A. P. Rumburg, Deputy. [3]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3532—IN BANKRUPTCY.

In the Matter of GEORGE R. JESSEE, Bankrupt.

Memorandum.

Messrs. L. B. DONLEY and ALLEN, WINSTON & ALLEN, Attorneys for the First National Bank of Colville.

Messrs. DODDS & DODDS, Attorneys for the Trustee.

Upon a petition of the Trustee, The First Na-

tional Bank of Colville, Washington, has been ordered to show cause why a chattel mortgage on two Elcar automobiles for the sum of $3617.50 given to it by the bankrupt, October 17th, 1920, should not be adjudged void because it contains no jurat to the affidavit of good faith, and why the two automobiles mentioned in the mortgage should not be turned over to the Trustee, free of any lien of said mortgage.

I find the facts to be as follows:

The bankrupt bought the above-mentioned automobiles from the Hoffman-Bacon-McBroon Company of Spokane. The First National Bank of Colville advanced the purchase price thereof to the Hoffman-Bacon-McBroom Company, and took from the bankrupt a chattel mortgage, the one in question. The mortgage is properly executed and acknowledged and was filed in the office of the Auditor of Stevens County, Washington, on November 18th, 1920. The affidavit of good faith is properly worded and is signed by the mortgagor. The Notary Public before whom the instrument was acknowledged has affixed his seal to the jurat of the affidavit of good faith, but has not signed his name thereto. He testified that the mortgagor actually swore to the affidavit and there is no testimony to the contrary. Shortly after the execution of the mortgage, the bankrupt [4] was given possession of the cars by the vendor, and drove them to Marcus, Washington. On December 9th or 10th, 1920, the bankrupt made an assignment to one John Holenbeck, for the benefit of his creditors, of all the stock of cars, acces-

sories, machinery, sundries, tools, supplies, and equipment contained in his garage. The cars covered by the chattel mortgage were in the garage at the time. It appears that the assignment was not delivered until a few days later. On the day of the execution of the assignment, the Bank's president instructed Hollenbeck to take possession of the cars for the Bank. Hollenbeck testified that he did take possession of the cars for the Bank, put storage tags on them, upon which was written the date and the name, First National Bank. That the tags remained on the cars until they were removed by the Bank, on December 28th, 1920, and that the Bank then paid storage on them.

On December 28th, 1920, Mr. Dodds, representing the creditors, called on Mr. Waddell, president of the Bank, and told him that the creditors would not recognize the mortgage. Mr. Dodds returned to Spokane that day and after six o'clock P. M. filed a petition to have Jessee adjudged bankrupt. About 5:15 P. M. of that day, the Bank had taken actual physical possession of the cars.

The Bank has consented that the questions at issue be decided by this Court on summary proceedings, regardless of whether it actually has jurisdiction to decide them.

The first question to be decided is whether the failure of the Notary Public to sign his name to the jurat of the affidavit of good faith renders the mortgage void as to the Trustee, even though it is shown by extrinsic evidence that the mortgagor in fact swore to the affidavit before the notary.

The statutes of our state pertinent to the question are the following: [5]

Section 3660 of Remington & Ballinger's Codes, as amended in 1915, reading as follows:

> "Affidavit of Good Faith—Acknowledgment —Recording. A mortgage of personal property is void as against all creditors of the mortgagor, both existing and subsequent, whether or not they have or claim a lien upon such property, and against all subsequent purchasers, pledgees, and mortgagees and encumbrancers for value in good faith unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and unless it is acknowledged and filed within ten days from the time of the execution thereof in the office of the county auditor of the county in which the mortgaged property is situated as provided by law."

Section 8298 of Remington's Codes and Statutes of Washington, which authorized Notaries Public to take affidavits and administer oaths.

Section 8299, which reads:

> "Signature—Seal Need not be Affixed, When. It shall not be necessary for a notary public, in certifying an oath to be used in any of the courts in this state, to append an impression of his official seal, but in all other cases when the notary public shall sign any instrument officially, he shall, in addition to his name and the

words 'notary public,' add his place of residence and affix his official seal."

Unless the statutes require that the jurat to the affidavit of good faith accompanying a chattel mortgage be signed by the notary public who administered the mortgagor's oath, there seems to be no doubt that an affidavit lacking the notary's signature, provided it was actually sworn to by the mortgagor before the notary, is sufficient.

Section 3660, mentioned above, reads:

"Unless it is accompanied by the affidavit of the mortgagor * * * ."

This language, it seems to me, requires that the affidavit of good faith be complete in so far as not to require an interested party to search further than the record itself for proof that the required oath was duly taken.

This view is further supported by Section 8299, above quoted, which, although it does not explicitly state an affidavit shall be signed by the notary public, appears to infer that his signature is required. It does require that in all [6] cases, except the certificates to oaths to be used in any of the courts of the state, that a notary public shall, when he shall sign any instrument, officially, affix his seal, in addition to his name. It is argued by counsel for the bank that the words: "When he shall sign other instruments, officially, he shall affix his official seal," infers that it is not necessary for the notary to sign, and simply require that when he does sign, he shall affix his seal. If this contention is sound, an affidavit is good which lacks both the signature and

seal of the notary public. While this construction of the language of the statute is possible, it is so inconsistent with the other requirements of the section that I am sure it was not intended.

While the exact question under consideration has never been passed upon by our Supreme Court, the Court has, in the case of Stetson & Post Mill Company vs. McDonald, 5 Wash. 496, rendered a decision which throws some light upon it. In this case, it was held that when the seal of a notary was not attached to the jurat of a notice of lien, the notice was invalid and that extrinsic proof could not be received that the notice had in fact been sworn to, for the purpose of curing the omission of a notary to affix his seal. In answer to the argument that such proof should be received, the Court said:

> "These notices are required to be recorded or filed for record and the notice being invalid when filed, subsequent proof could not be made as to any material fact omitted, to render the notice valid and make it relate back to the time it was filed for record."

See also: Gates vs. Brown, 1 Wash. 474.

These two cases construe section 8299. It will be noticed that the requirements as to the formality of the jurat of a lien notice are no different than those of the affidavit of good faith accompanying a chattel mortgage.

It is contended by counsel for the Bank that the case of Woods vs. Young Lumber Company, 107 Wash. 432, decides the question. [7] In this case,

the notary signed the certificate of acknowledgment and jurat to the affidavit of good faith, but affixed his seal only to the acknowledgment. It was held that there being no statute to prevent the notary evidencing the two acts by one certificate, under the circumstances, he may be considered as having done so, in so far as the affixing of his official seal is concerned. The reason upon which the Court based its decision is stated in the following language:

> "I adopt this conclusion the more readily because the objection is merely formal, the certificate in its present form furnishing all the security against error and imposing upon the notary all the responsibility which it could do if another seal were added."

It is inconceivable to me that the Court could say in the case under consideration:

> "The certificate in its present form furnishes all the security against error and imposes upon the notary all the responsibility which it could do if another signature were added."

As counsel for the Trustee says, any third person could put on a seal. The statement of the counsel for the Bank that any person could forge a signature, is also true, but few can do it so well as to defy detection.

It is my opinion that under the statutes, the affidavit of good faith required by section 3660 to be filed with a chattel mortgage must be complete in itself and that creditors who examine the records are not required to go outside of the record to ascer-

tain whether an affidavit of good faith, the jurat of which does not contain the notary's signature, was actually sworn to, even though the jurat bears the notary's seal.

If the defective affidavit of good faith makes the mortgage invalid as to the Trustee, the Bank contends that its taking possession of the mortgaged property before the petition in bankruptcy was filed, cured the defect.

Without deciding whether or not the Bank did take possession of the mortgaged property before the petition in bankruptcy [8] was filed, but assuming that it did, I decide that such taking possession did not make the mortgage valid and effective as to the Trustee.

In the case of Watson vs. First National Bank, 82 Wash. 65, it is held that where a chattel mortgage is invalid as to creditors, for lack of an affidavit of good faith and because of failure to record it, it is nevertheless valid as between the parties and becomes effective as to a subsequent general creditor when, with the consent of the mortgagor, the mortgagee took possession of the property before such creditor acquired a specific lien upon the property.

This was the law prior to the amendment of section 3660 in 1915. By the plain terms of the amended section quoted above, a chattel mortgage not accompanied by an affidavit of good faith is void as to all creditors of the mortgagor, both existing and subsequent, whether or not they have or claim a lien upon the mortgaged property. The mortgage of The First National Bank of Colville

was therefore void as to the bankrupt's creditors and void as to the trustee who succeeded to their rights.

An order wil be made declaring said mortgage void as to the Trustee and directing The First National Bank of Colville to turn over the said automobiles or the proceeds thereof to the Trustee.

Respectfully submitted,

(Signed) SIDNEY H. WENTWORTH,
Referee in Bankruptcy.

[Endorsements]: Referee's Certificate on Review. Filed in the U. S. District Court for the Eastern District of Washington, September 21, 1921. W. H. Hare, Clerk. By E. M. Hardin, Deputy. [9]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3532—IN BANKRUPTCY.

In the Matter of GEORGE R. JESSEE, Bankrupt.

Memorandum.

ALLEN, WINSTON & ALLEN and L. B. DONLEY, Attorneys for the Mortgagee.

F. B. DODDS, Attorney for the Trustee in Bankruptcy.

RUDKIN, District Judge.

This is a proceeding to review an order of the referee adjudging a chattel mortgage invalid be-

cause the jurat to the affidavit of good faith was not signed by the notary. The instrument is in all respects regular in form; the affidavit of good faith was signed by the mortgagor, the seal of the notary was affixed to the jurat containing the name of the notary and the expiration of his commission, and the certificate of acknowledgment was signed by the notary and his official seal affixed. The question presented depends upon the construction of the statutes of the state. Section 3660, Rem. & Bal. Codes, provides:

> "A mortgage of personal property is void as against all creditors of the mortgagor, both existing and subsequent, whether or not they have or claim a lien upon such property, and against all subsequent purchasers, pledgees, and mortgagees and encumbrancers for value in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and unless it is acknowledged and filed within ten days from the time of the execution thereof in the office of the county auditor of the county in which the mortgaged property is situated as provided by law."

Section 8298 provides:

> "It shall not be necessary for a notary public, in certifying an oath to be used in any of the courts in this state to append an impression of his official seal, but in all other cases when the notary public shall sign any instrument officially he shall, in addition to his name and the

words 'notary public,' add his place of residence and affix his official seal."

Inasmuch as the oath to the affidavit of good faith is [10] not to be used in any of the courts in this state, the official seal of the notary is an essential part of the oath. In Woods vs. Young Lumber Co., 107 Wash. 432, the jurat was signed by the notary but his official seal was not affixed. The seal was affixed, however, to the certificate of acknowledgment and in discussing the effect of the failure to affix the seal to the jurat the Supreme Court said:

> "It is plain that both the acknowledgment and the affidavit of good faith are necessary to a complete execution of the mortgage, except as between the mortgagor and mortgagee. These two acts are so intimately related to each other in their purpose that the evidencing thereof by the notary might well be done by the notary in one certificate, especially when the instrument is acknowledged and the affidavit made by the same person. Plainly there is nothing in the statute requiring him to evidence the two acts by two separate certificates. We are of the opinion that, in view of the concurrence of all the acts on the part of the mortgagor, mortgagee and the notary, the acknowledgment and affidavit of good faith being made by the same person in behalf of the lumber company, the two certificates of the notary may be considered as one act; and the attaching of the seal to the certificate of acknowledgment be also deemed an attaching of it to the jurat cer-

tifying to the president's subscribing and swearing to the affidavit in good faith."

The official seal is as essential to the affidavit of good faith as is the signature of the notary, but if the appending of one seal satisfies the requirements of law, both as to the affidavit and as to the certificate of acknowledgment, I fail to see why one signature is not equally efficacious. I admit the question is not entirely free from doubt, but it seems to me the doubt should be resolved in favor of the *bona fide* mortgagee. It is safe to say that no credit was extended to the mortgagor because of the omission complained of, and the question is rather a technical one, if compliance with the requirements of a statement can ever be said to be technical. Oral testimony tending to show that an oath was in fact administered was in my opinion incompetent, and whether the seal of the notary may be treated as his signature I will not discuss.

The order of the referee is reversed. [11]

[Endorsements]: Memorandum. Filed in the U. S. District Court for the Eastern District of Washington. October 31, 1921. W. H. Hare, Clerk. By Eva M. Hardin, Deputy. [12]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3532—IN BANKRUPTCY.

In the Matter of GEORGE L. JESSEE, Bankrupt.

Order Reversing Order of Referee and Declaring Mortgage Valid.

This cause having heretofore come on for hearing before Hon. Frank H. Rudkin, Judge of the above-entitled court, on the petition of The First National Bank of Colville, for a writ of review from the order of Sidney H. Wentworth, Esquire, Referee in Bankruptcy, adjudicating void a certain mortgage on two automobiles given by the bankrupt to The First National Bank of Colville, Washington, on November 17th, 1920, the mortgagee being represented by L. B. Donley and Allen, Winston & Allen, its attorneys, and the Trustee being represented by Messrs. Dodds & Dodds, his attorneys, and the Court having filed his opinion herein, it is by the Court

ORDERED, ADJUDGED and DECREED that the said order of the Referee be and the same is hereby reversed and the said mortgage of the bank be and the same is hereby declared to be valid.

Exception of Trustee allowed.

Dated at Spokane, Washington, this 19th day of January, 1922.

(Signed) FRANK H. RUDKIN,
District Judge.

O. K.

(Signed) L. B. DONLEY,
ALLEN, WINSTON & ALLEN,

[Endorsements]: Order. Filed in the U. S. District Court for the Eastern District of Washington.

January 19, 1922. W. H. Hare, Clerk. A. P. Rumburg, Deputy. [13]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3532—IN BANKRUPTCY.

In the Matter of GEORGE R. JESSEE, Bankrupt.

Petition for Appeal.

RE: MORTGAGE FIRST NATIONAL BANK OF COLVILLE.

J. F. Herrick, Trustee of the Estate of George R. Jessee, Bankrupt, feeling himself aggrieved by the order of this Court, made and entered herein on the 19th day of January, 1922, does hereby appeal from the said order declaring and adjudging the said mortgage of The First National Bank of Colville to be valid as against the Trustee, and reversing the order of the Referee, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herein, and prays that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings, and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, in the State of California.

Dated this 19th day of January, A. D. 1922.

(Signed) FABIAN B. DODDS,
Attorney for Trustee.

[Endorsements]: Petition for Appeal. Copy Received January 19, 1922. (Signed) L. B. Donley and Allen, Winston & Allen, Attorneys for Respondent. Filed in the U. S. District Court for the Eastern District of Washington. January 19, 1922. W. H. Hare, Clerk. By A. P. Rumburg, Deputy. [14]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3532—IN BANKRUPTCY.

In the Matter of GEORGE R. JESSEE, Bankrupt.

Order Allowing Appeal.

RE: MORTGAGE FIRST NATIONAL BANK OF COLVILLE.

The foregoing petition of J. F. Herrick, Trustee of the Estate of the said George R. Jessee, Bankrupt, for an appeal from that certain order made and entered in the above-entitled proceeding in bankruptcy on the 19th day of January, 1922, to the United States Circuit Court of Appeals for the Ninth Circuit, is hereby granted and allowed and this appeal being by a trustee in bankruptcy, no bond need be filed.

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Order Allowing Appeal. Received Copy January 19, 1922. (Signed) L. B. Donley and Allen, Winston & Allen, Attorneys for Respondent. Filed in the U. S. District Court for the Eastern District of Washington. January 19, 1922. W. H. Hare, Clerk. By A. P. Rumburg, Deputy. [15]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3532.

In the Matter of GEORGE R. JESSEE, Bankrupt.

Assignments of Error.

Comes now J. F. Herrick, Trustee of the Estate of George R. Jessee, Bankrupt, and says that in the order made and entered in the above-entitled proceedings, on the 19th day of January, 1922, there is manifest error and files the following assignments of error committed and happening in the said proceedings, upon which he will rely in his appeal from said order:

I.

In reversing the order of the referee made and entered adjudging the mortgage of The First National Bank of Colville void as against the Trustee.

II.

In refusing to affirm the order of the Referee made and entered adjudging the mortgage of The

First National Bank of Colville to be void as against the Trustee.

III.

In adjudging the chattel mortgage to The First National Bank of Colville to be valid as against the Trustee.

IV.

In failing to adjudge the chattel mortgage of The First National Bank of Colville void as against the Trustee.

V.

In reversing the order of the Referee ordering the return of the property covered by said chattel mortgage, or the proceeds thereof, to the Trustee. [16]

VI.

In failing to affirm the order of the Referee, ordering the return of the property covered by said chattel mortgage to the Trustee.

VII.

In denying that the Trustee is entitled to the property covered by said chattel mortgage, free and clear from the lien thereof.

(Signed) FABIAN B. DODDS,
Attorney for Trustee.

[Endorsements]: Assignments of Error. Due service of within assignments of error acknowledged this 19th day of January, 1922. (Signed) L. B. Donley and Allen, Winston & Allen, Attorneys for First National Bank of Colville. Filed in the U. S. District Court for the Eastern Dis-

trict of Washington. January 19, 1922. W. H. Hare, Clerk. By A. P. Rumburg, Deputy. [17]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3532—IN BANKRUPTCY.

In the Matter of GEORGE R. JESSEE, Bankrupt.

Citation on Appeal (Copy).

United States of America,—ss.

The President of the United States to the First National Bank of Colville, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 18th day of February, 1922, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States, for the Eastern District of Washington, in the Matter of George R. Jessee, Bankrupt, wherein J. F. Herrick, as Trustee of the Estate of George R. Jessee, Bankrupt, is appellant, and the First National Bank of Colville is the appellee, to show cause, if any there be, why the order of the District Judge entered the 19th day of January, 1922, adjudging the chattel mortgage of the First National Bank of Colville to be valid, and reversing the Referee, should

not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. WILLIAM H. TAFT, Chief Justice of the United States, this 19th day of January, in the year of our Lord, 1922.

(Signed) FRANK H. RUDKIN,
District Judge.

[Seal] Attest: (Signed) W. H. HARE,
Clerk.
By A. P. Rumburg,
Deputy. [18]

[Endorsements]: Citation on Appeal (Lodged Copy). Due service of the within citation on appeal admitted this 19th day of January, 1922. (Signed) L. B. Donley and Allen, Winston & Allen, Attorneys for Colville Bank. Filed in the U. S. District Court for the Eastern District of Washington. January 19, 1922. W. H. Hare, Clerk. By A. P Rumburg, Deputy. [19]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3532—IN BANKRUPTCY.

In the Matter of GEORGE R. JESSEE, Bankrupt.

Praecipe for Transcript of Record.

To the Clerk of the United States Circuit Court for the Eastern District of Washington, Northern Division:

YOU ARE HEREBY REQUESTED, in preparing your return to the citation on appeal in the above-entitled cause, to include therein the following:

1. Stipulation in the case.
2. Memorandum of opinion of the Referee.
3. Memorandum of opinion of the District Judge.
4. Order of the District Judge reserving the order of the Referee and declaring the mortgage of the First National Bank of Colville to be valid as against the Trustee, this being the order appealed from.
5. Petition for appeal.
6. Order allowing appeal.
7. Assignments of error.
8. Citation.
9. Praecipe for transcript of record.

which comprises all of the papers, records and other proceedings which are necessary to the hearing of the appeal in said matter in the United States Circuit Court of Appeals for the Ninth Circuit, and that no other papers, records, or other proceedings than those above mentioned are necessary to be included by the Clerk of said Court, in making up his return to said citation as a part of such record. [20]

Dated this 19th day of January, 1922.

(Signed) FABIAN B. DODDS,
Attorney for Trustee.
L. B. DONLEY,
ALLEN, WINSTON & ALLEN,
Attorneys for First National Bank of Colville.

[Endorsements]: Praecipe for Transcript of Record. Filed in the U. S. District Court for the Eastern District of Washington, January 19, 1922. W. H. Hare, Clerk. By A. P. Rumburg, Deputy. [21]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3532.

In the Matter of GEORGE R. JESSEE, Bankrupt.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing pages from 1 to 21 inclusive, to be a full, true, correct and complete copy of the record, pleadings, testimony and all proceedings had in said action as called for by J. F. Herrick, Trustee of the Estate of George R. Jessee, appellant, and First National Bank of Colville, appellee, in their praecipes for a transcript of the record herein, as the same remain of

record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the order, of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of Nine Dollars and Thirty-five Cents ($9.35), and that the same has been paid to me by Fabian B. Dodds, Solicitor for J. F. Herrick, as trustee, and appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at the city of Spokane, [22] in said Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 13th day of February, A. D. 1922, and the Independence of the United States of America, the one hundred and forty-sixth.

[Seal] ALAN G. PAINE,
Clerk. [23]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

IN BANKRUPTCY—No. 3532.

In the Matter of GEORGE R. JESSEE, Bankrupt.

Citation on Appeal (Original).

The United States of America,—ss.

The President of the United States to the First National Bank of Colville, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 18th day of February, 1922, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States, for the Eastern District of Washington, in the matter of George R. Jessee, Bankrupt, wherein J. F. Herrick, as Trustee of the Estate of George R. Jessee, Bankrupt, is appellant, and the First National Bank of Colville is the appellee, to show cause, if any there be, why the order of the District Judge entered the 19th day of January, 1922, adjudging the chattel mortgage of the First National Bank of Colville to be valid, and reversing the Referee, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the HON. WILLIAM H. TAFT, Chief Justice of the United States, this 19th day

of January, in the year of our Lord, 1922.

FRANK H. RUDKIN,
District Judge.

[Seal] Attest W. H. HARE,
Clerk.
By A. P. Rumburg,
Deputy. [24]

[Endorsed]: No. 3532. In the District Court of the United States for the Eastern District of Washington, Northern Division. In the Matter of George R. Jessee, Bankrupt. Citation on Appeal. Lodged in the U. S. District Court, Eastern Dist. of Washington. Jan. 19, 1922. Wm. H. Hare, Clerk. A. P. Rumburg, Deputy.

Due service of the within Citation on Appeal admitted this 19th day of January, 1922.

L. B. DONLEY,
ALLEN, WINSTON & ALLEN,
Attorneys for Colville Bank. [25]

[Endorsed]: No. 3830. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of George R. Jessee, Bankrupt. J. F. Herrick, as Trustee of the Estate of George R. Jessee, Bankrupt, Appellant, vs. First National Bank of Colville, Washington, a Corporation, Appellee. Transcript of Record. Upon Appeal from the

United States District Court for the Eastern District of Washington, Northern Division.

Filed February 16, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuil.

By Paul P. O'Brien,

Deputy Clerk.

No. 3330

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF
GEORGE R. JESSEE, Bankrupt,
J. F. HERRICK, as Trustee of the Estate of GEORGE R. JESSEE, Bankrupt,
Petitioner and Appellant,

vs.

FIRST NATIONAL BANK OF COLVILLE, WASHINGTON, a corporation.
Respondent and Appellee.

BRIEF
FOR PETITIONER AND APPELLANT

FABIAN B. DODDS,
1220 Old National Bank Building,
Spokane, Washington.
Attorney for Petitioner and Appellant.

Filed:_____Clerk

SHAW & BORDEN CO. 199979

FILED
AUG 26 1922
F. D. MONCKTON,
CLERK

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IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF
GEORGE R. JESSEE, Bankrupt,
J. F. HERRICK, as Trustee of the
Estate of GEORGE R. JESSEE,
Bankrupt,
Petitioner and Appellant,

vs.

FIRST NATIONAL BANK OF
COLVILLE, WASHINGTON, a
corporation.
Respondent and Appellee.

BRIEF
FOR PETITIONER AND APPELLANT

STATEMENT OF CASE.

This matter is brought to this Court both on a Petition to Revise in matter of law under Sec. 24 b. of the Bankruptcy Act, and also on Appeal. It is not clear from the decisions which is the proper method. A pure question of law is presented, however, and that the case might not be thrown out on a technicality, it has been brought up by both methods.

The facts are stipulated and are as follows: (Tr. 13)

On November 17th,, 1921, the bankrupt gave to

the First National Bank of Colville a chattel mortgage for Thirty-six Hundred and seventeen Dollars ($3617.00), covering two automobiles. At that time, the First National Bank of Colville advanced the full purchase price of the automobiles in question and the mortgage was given for the purpose of securing the purchase price thereof.

On the 18th day of November, 1920, the mortgage was filled in the office of the Auditor of Stevens County, Washington, in which County the automobiles were kept.

The notary did not sign the affidavit of good faith. He did, however, attach his seal opposite the place where his signature should have been. The affidavit of good faith is followed on the instrument by the acknowledgment and the acknowledgment is in proper form, signed by the notary, and his seal placed thereon. Undisputed oral testimony was admitted over objection, that the mortgagor (the bankrupt herein) swore to the affidavit of good faith.

The mortgage was a single sheet of paper with the blank form for the affidavit and acknowledgment on the back thereof.

The petition in bankruptcy was filed December 28th, 1920 and adjudication made January 14th, 1921, and J. F. Herrick qualified as Trustee January 29th, 1921, and is now the Trustee of said estate.

The sole question involved is, whether or not the mortgage is valid as against the Trustee in Bankruptcy.

ASSIGNMENTS OF ERROR.

The Petitioner and Appellant contends that the lower Court erred as follows: (Tr. 30).

I.

In reversing the order of the referee made and entered adjudging the mortgage of The First National Bank of Colville void as against the Trustee.

II.

In refusing to affirm the order of the Referee made and entered adjudging the mortgage of The First National Bank of Colville to be void as against the Trustee.

III.

In adjudging the chattel mortgage to The First National Bank of Colville to be valid as against the Trustee.

IV.

In failing to adjudge the chattel mortgage of The First National Bank of Colville void as against the Trustee.

V.

In reversing the order of the Referee ordering the return of the property covered by said chattel mortgage, or the proceeds thereof, to the Trustee.

VI.

In failing to affirm the order of the Referee, ordering the return of the property covered by said chattel mortgage to the Trustee.

VII.

In denying that the Trustee is entitled to the property covered by said chattel mortgage, free and clear from the lien thereof.

ARGUMENT.

The Trustee relies upon the following propositions:

I. That the chattel mortgage in question is void as against the Trustee under the Statutes of the State of Washington unless it is accompanied by an affidavit of good faith, and the Notary's signature to the acknowledgment and the placing of the two seals on the instrument are not sufficient.

II. That the mortgage being over three hundred dollars must be recorded as well as filed under the Statutes of the State of Washington.

I.

Sec. 3660 *Remington's* 1915 *Codes and Statutes of Washington* reads as follows:

> "Affidavit of Good Faith—Acknowledgment—Recording. A mortgage of personal property is void as against all creditors of the mortgagor, both existing and subsequent, whether or not they have or claim a lien upon such property, and against all subsequent purchasers, pledgees, and mortgagees and encumbrances for value in good faith *unless it is accompanied by an affidavit of the mortgagor that it is made in good faith,* and without any design to hinder, delay, or defraud creditors, and unless it is acknowledged and filed within ten days from the time of the execution thereof in the office of the county auditor of the county in which the mortgaged property is situated as provided by law."

Sec. 8298 reads as follows:

> "Every duly qualified Notary Public is authorized in any County in this state—

2. To take acknowledgments of all deeds and other instruments of writing, and certify to same in the manner required by law.

3. To take depositions and affidavits and administer all oaths required by law to be administered; and every Attorney at Law who is a Notary Public may administer any oath to his client and no pleadings or affidavits shall, on that account, be held by any Court to be improperly verified."

Sec. 8299 reads:

"Signature—Seal Need not be Affixed, When. It shall not be necessary for a notary public, in certifying an oath to be used in any of the courts in this state, to append an impression of his official seal, but in all other cases when the notary public shall sign any instrument officially, he shall, in addition to his name and the words 'Notary Public,' add his place of residence and affix his official seal."

It will be noticed that Sec. 3660 is an iron-clad statute. It is void "Unless accompanied by the affidavit of the mortgagor * * * * * * and acknowledged * * * and filed within ten days * * *"

The Supreme Court of Washington has construed this statute in *Clark vs. Killian*, 116 *Wash.*, 532, 199 *Pac.*, 721 (*Aug.* 1921).
and there say—

"Under this Statute, a chattel mortgage not recorded within the time, is void as to all the persons mentioned and as to them is of no effect."

As the *filing* and *affidavit*, are in the same category, the decision applies also to the case at Bar. It follows

then that unless the affidavit in this case is perfect on its face, the mortgage is void, for the Trustee is a *creditor.* (*Bankruptcy Act Sec.* 47 *a*-(2), 70*e*) and parol evidence cannot be introduced. *Gates v. Brown* 1 *Wash.,* 474. *Stetson & Post Mill Company v. McDonald,* 5 *Wash.* 496. In the latter case, the Court said—

> "These notices are required to be recorded or filed for record and the notice being invalid when filed, subsequent proof could not be made as to any material fact omitted to render the notice valid and make it relate back to the time it was filed for record."

An intention to sign cannot be construed as a signing. In American Sav. Bank & Tr. Co. vs. Helgesen, 67 Wash. 572, the Court sitting en banc says:

> "Here, failure to sign the mortgage was due entirely to an inadvertence and oversight. An intention to sign an instrument cannot be held equivalent to an actual signing of the instrument."

In Jennings vs. Schwartz, 82 Wash. 209, the Court, on page 218, says, in construing the recording statute relative to conditional sales:

> "The statute in question has a wider effect. It has the elements of a recording act. It will be remembered that prior to its enactment, unrecorded conditional bills of sale of personal property were valid in this state, not only as between the vendor and vendee, but as to encumbrances and purchasers without notice, and subsequent bona fide creditors of the vendee. It was thus possible for the vendee of such property to commit frauds by disposing of the property to innocent third persons and by using it as a basis upon which to obtain credit. While

the statute therefore tends in the same degree to prevent frauds between vendors and vendees through the instrumentality of perjury as does the statutes of frauds, its principal if not primary purpose is to prevent the vendor and vendee of such property from committing frauds upon third persons. It would seem then, since it affects persons other than the parties to the agreement, the courts are justified in giving it a more strict construction than it gives to the statute of frauds; that it is proper to require that the instrument when filed shall show on its fact a compliance with the statute; that the instrument shall be complete in itself; thus doing away with the necessity of inquiring into entrinsic matters to determine its validity.

Tested by the more strict rule, we are clear that this memorandum was not signed by the vendor within the meaning of the statute. The instrument would appear no different on its fact had it been prepared wholly by the vendee without the knowledge or consent of the vendor. Whether it was signed by the vendor or not was thus subject to dispute, even as between the parties, and the question could only be determined by an examination into their acts and conduct. The rights of third persons should not be left to depend upon such circumstances; as to them, the instrument should be fair upon its face. As this instrument is not thus fair, we hold the sale absolute as to subsequent creditors in good faith."

See also *Kennery vs. N. W. Junk Co.*, 108 *Wash.* 859.

Counsel contends that *Woods vs. Young Lumber Company*, 107 *Wash*, 432 is controlling here. In that case, the Court held that two signatures and one seal are enough, and counsel reasons why not two seals and

one signature; we ask if this is so, why not one seal and one signature, or one signature or one seal, or nothing at all? Where will you stop? See *Shortle v. Stockton, 7 Watts (Pa.)* 526.

As the referee says, anyone can put on a seal but few can forge a signature so well as to defy detection. See *Dawsey vs. Kirvan (Ala)* 83 *So.* 338.

It seems to us that we have a different situation here than in the Woods case. It is true the Court there used certain language (Dicta) saying—

> "Two acts * * * might well be done by the Notary in one certificate,"

but in the present case, it is apparent that it was *not* the intention of the Notary to evidence the two acts by one certificate, and two acts are *not* the same. The power to take acknowledgments is given by subdivision 2, Sec. 8298 above quoted, while the power to administer oaths is given by Sec. 3. The Notary had no power at common law to administer oaths (20 *R. C. L.* 333).

Counsel will contend that it is not necessary for the Notary to sign the affidavit to make it efficacious. This is answered by a reference to Sec. 8299 supra which says—"When he shall sign".

Furthermore, in matters involving instruments of this kind which must be complete to be filed, it would be absurd to require third persons to go behind the record,

and hunt up the Notary to see if the affidavits were in fact sworn to.

Stetson etc. vs. McDonald, supra.
Kidder vs. Fay, 60 *Wis.* 218, 18 *N. W.* 839.

Counsel also contends that the seal may be regarded as a signature. This is not the law, see

Clark vs. Wilson, 19 *N. E.* 860, 127 *Ill.* 449.
Holmes vs. Crooks, 76 *N. W.* 1073, 56 *Nebr.* 466.

Furthermore, the signature of a Notary is an official act. He may not delegate the power, therefore the cases relating to the forms of ordinary signatures are not applicable here.

The mortgagee here is a bank, the very basis of a bank's business is the individuality of the signature. Counsel loses sight of the fact that the *signature* authenticates the affidavit and the *seal* authenticates the signature. There being no signature, the seal means nothing.

Counsel will also argue that this is purely a "formal objection", that no one has been hurt. Under modern business methods and recording statutes a creditor (and much less a Trustee in bankruptcy) is not required to go behind the statute. There is nothing in the record to show that creditors were not hurt. The objection would be just as "formal" if the instrument contained neither affidavit nor acknowledgment. The Legislature saw fit to pass the statute and the Courts may not nullify it. The trial Court in his opinion says—(Tr. 26)

"I admit the question is not free from doubt".

It is certainly a dangerous precedent to allow signatures to written instruments, where the rights of third parties have intervened, to be put in by absent treatment and mental resolve.

II.

Sec. 3665 Remington's 1915 Codes and Statutes of Washington is as follows:

> "Regarding mortgages in excess of three hundred dollars. A mortgage given to secure the sum of three hundred dollars or more exclusive of interest, costs and attorney's or counsel fees, may be recorded and indexed with like force and effect as if this act had not been passed, but such mortgage or a copy thereof must also be filed and indexed as required by this Act."

It is our contention that a chattel mortgage of over three hundred dollars must be recorded to import notice. The only case construing the statute is *Van Winkle vs. Mitchell,* 66 *Wash.* 296. In that case, the Court said, referring to the statute 3665—

> "This has reference to another class of mortgages with a method for giving notice distinct from the other."

It is true the statute says "may" but the Court is familiar with the rule of statutory construction whereby *may* will be read *must* and vice versa in order to give sense to the statute. If this is not a mandatory statute, it means nothing.

We respectfully contend that the order of the District Judge should be reversed and the mortgage declared void as to the Trustee in Bankruptcy.

Respectfully submitted,

FABIAN B. DODDS,

Attorney for Petitioner and Appellant.

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IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF
GEORGE R. JESSEE, Bankrupt,
J. F. HERRICK, as Trustee of the
Estate of GEORGE R. JESSEE,
Bankrupt,
Petitioner and Appellant,
vs.
FIRST NATIONAL BANK OF
COLVILLE, WASHINGTON, a
corporation,
Respondent and Appellee.

BRIEF
FOR RESPONDENT AND APPELLEE

STATEMENT OF THE CASE

We desire to add but little to the statement contained in the brief for petitioner and appellant. The mortgage in question and the evidence in the cause show that the signature of the mortgagor, the bankrupt, to the mortgage and the affidavit of good faith were affixed at the same time, and that the instrument is

entirely complete save for the lack of the signature of the notary on that part of the instrument where the blank form of affidavit of good faith is found.

ARGUMENT

The bank contends as follows:—

1. The chattel mortgage in question, as finally filed, is in substantial compliance with the laws of the State of Washington, and was entitled to be filed of record.

2. A chattel mortgage, under the laws of the State of Washington, need only be filed and need not be recorded.

I.

Starting with the fundamental proposition that this court will follow the decisions of the court of last resort of the State of Washington upon the construction and effect of the statutes of the State of Washington in question here, we say, first: that under the decisions of the Washington Supreme Court, the mortgage is valid; and, secondly: that upon principle and authority it is likewise valid. It will be conceded that unless there has been a substantial compliance with the statute in the execution of the mortgage and in its au-

thentication and filing, the mortgage is void as to the trustee of the bankrupt's estate.

It is the law that as to the signature of the notary or other officer taking an acknowledgement or subscribing to an affidavit, "a substantial compliance with the statute is all that is required of the certificate." 1 C. J. 836. And likewise as to the necessity of affixing his official seal, "a substantial compliance with the statute is all that is required in any case." I. C. J. 838. This rule is approved in principle by the Supreme Court of the State of Washington in *Woods vs. Young Lumber Co.,* 107 *Wash.* 432.

In view of the controlling effect of the decisions of that court upon this court, and for the benefit of the court in considering the state court's well reasoned opinion, we quote the opinion in full as follows:—

> "PARKER, J.—The plaintiff Woods, as receiver of the Mountain Mill Company, seeks recovery of a money judgment against the defendant, Young Lumber Company, upon the ground that it has received a preference payment as a creditor of the Mountain Mill Company, after the company becomes insolvent. The lumber company demurred to the receiver's complaint upon the ground that it did not state a cause of action, which demurrer was sustained by the superior court; and the receiver electing to stand upon his complaint and not plead further, judgment of dismissal was rendered against him, from which he has appealed to this court.

The only question necessary for us to notice is as to whether or not the chattel mortgage executed by the mill company, under which a sale of certain of its property was had in satisfaction of the lumber company's claim after the mill company's insolvency, was void for want of the attaching of the notary's official seal to his jurat certifying to the subscribing and swearing to the affidavit of good faith made by the president of the mill company, the mortgagor. The acknowledgement and the affidavit of good faith were both made by the president of the mill company in its behalf before the same notary. The notary's certificate of acknowledgement and his jurat certifying to the subscribing and swearing to the affidavit of good faith by the president were separate certificates, each being separately signed by the notary. Near to his signature upon the certificate of acknowledgement he placed in the usual position an impression of his official seal. There was no other impression of his official seal elsewhere upon the instrument. The affidavit of good faith immediately followed the certificate of acknowledgement, and the notary's jurat certifying to the subscribing and swearing to the affidavit followed the president's signature thereto. The mortgage, certificate of acknowledgement, affidavit of good faith, and certificate of the notary of the making of the latter, manifestly constitute one instrument, executed in all its parts at the same time.

Counsel for appellant invokes the general rule that the absence of an impression of a notary's official seal from the certificate of his performance of an official act, except in cases wherein the statute expressly dispenses with the necessity of a seal, renders the certificate of no effect, as held in *Gates vs. Brown,* 1 *Wash.* 470, 25 *Pac.* 914, and *Stetson & Post Mill Co. vs. McDonald,* 5 *Wash.*

496, 32 *Pac.* 108. The real controversy here is whether or not there is such an absence of an impression of the notary's official seal from his jurat certifying to the subscribing and swearing to the affidavit of good faith as to render that certificate of no effect. In other words, can it be held that the one impression of the notary's official seal near his signature to the certificate of acknowledgement is sufficient in law to render both certificates effective under the facts in this case. It is plain that this mortgage was made with a view not only of its becoming a good mortgage, as between the mortgagor and mortgagee, but with a view of its becoming a good mortgage as against all persons who might, after its execution, become interested in the mortgaged property. This was manifestly the intent and purpose at the time of its execution; and, as we have noticed, all acts of the parties, including those of the notary, having to do with its execution were concurrent as to time and constitute in effect one transaction. This, we think, is plainly evidenced upon the face of the instrument as a whole.

In Rem. Code, Sec. 3660, relating to the manner of executing chattel mortgages, we read:

> "A mortgage of personal property is void * * * unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and unless it is acknowledged * * *"

It is plain that both the acknowledgement and the affidavit of good faith are necessary to a complete execution of the mortgage, except as between the mortgagor and mortgagee. These two acts are so intimately related to each other in their

purpose that the evidencing thereof by the notary might well be done by the notary in one certificate, especially when the instrument is acknowledged and the affidavit made by the same person. Plainly there is nothing in the statute requiring him to evidence the two acts by two separate certificates. We are of the opinion that, in view of the concurrence of all the acts on the part of the mortgagor, mortgagee and the notary, the acknowledgement and affidavit of good faith being made by the same person in behalf of the lumber company, the two certificates of the notary may be considered as one act; and the attaching of the seal to the certificate of acknowledgement be also deemed an attaching of it to the jurat certifying to the president's subscribing and swearing to the affidavit in good faith.

We have not had brought to our attention any authorities that we regard as exactly in point. It seems, however, that the reasoning of the decision of the New York Court of Appeals in *Olcott vs. Tioga R. C.*, 27 *N. Y.* 546, 84 *Am. Dec.* 298, supports the conclusion we here reach. In that case there was involved a notary's certificate of protest, and another separate certificate by him upon the same paper of the mailing of notices of the protest on the same day, the notary's seal being attached in the usual position near his signature to one certificate, but not elsewhere upon the paper. In holding that the one seal was sufficient to satisfy the law as to both certificates, and that it might be regarded as attached to both, Judge Selden, speaking for the court, all the other judges concurring, said:

'The statute contemplates but a single certificate as evidence of the presentment of a note or bill for payment, its protest, and the giving of notice of its

dishonor. The language of the statute is this: 'The certificate of a notary, under his hand and seal of office, of the presentment by him of any promissory note or bill of exchange for acceptance or payment, and of any protest of such bill or note for non-acceptance or non-payment, and of the service of notice thereof on any or all of the parties,' etc., 'shall be presumptive evidence of the facts contained in such certificate.' (3 R. S., ed., 474.) The notary may undoubtedly certify to each of the acts separately, but he may also, by one certificate, verify them. If the certificate be 'under his hand and seal of office, it is sufficient, and it cannot be of any importance where the seal is affixed. It may be at the beginning, at the end, or anywhere upon the margin, or might be appended by a ribbon, after the manner of the sealing of ancient charters. The officer is not required to certify to the sealing, but it is sufficient if the seal be, in fact, affixed, and the name signed. Unquestionably, therefore, if the seal had been placed where it is, and the signature only at the bottom of the last part of the certificate, the whole would have been sufficiently verified. I do not think it is any the less so byreason of the words, *'In testimonium veritatis,'* with the signature opposite the seal, between the two parts of the certificate. The whole may, with propriety, be regarded as one certificate, once sealed and twice signed. *I adopt this conclusion more readily, because the objection is merely formal, the certificate, in its present form, furnishing all the security against error, and imposing upon the notary all the responsibility which it could do if another seal were added.'*

We have italicized the portion of the language used by the learned judge which we think furnishes the key to the solution of our problem. The only difference, we think, between the situation there

involved and that here involved, is that there the statute seems to have contemplated evidencing the facts by a single certificate of the notary, while here our statute is silent upon the question of whether the notary shall evidence the taking of the acknowledgement and the subscribing and swearing to the affidavit of good faith by one or two certificates. We are quite convinced, however, that, under our statute, there is nothing preventing the notary evidencing the two acts by one certificate, and that, under the circumstances here shown, he may be considered as having done so, in so far as the attaching of his official seal is concerned. The only decsion coming to our notice which we regard as being authority to the contrary is that of *De Graw vs. King,* 28 *Minn.* 118, 9 *N. W.* 636.

The judgment is affirmed."

Authority, however, is not wanting in support of our contention from jurisdictions without this state. In *Wright vs. Wilson,* 17 *Mich.,* 192, there was presented the queston of the validity of a deed executed by a husband and wife. From the record appeared first, an acknowledgement in the name of the husband, but the signature of the acknowledging officer was missing. There then followed a second acknowledgement in the name of the wife taken separately and apart from the husband, and to this latter acknowledgement there was affixed the name of the justice of the peace authenticating the instrument. The Supreme Court of Michigan, in holding the deed valid, states that there were probably two blanks for the taking of the acknowledge-

ments upon the one deed, the acknowledgement as to the wife being last on the paper, held that there was a substantial compliance with the law, and that the instrument was valid. The opinion was written by that well known and able jurist Judge Christiancy, and concurred in by Justices Campbell and Graves, Chief Justice Cooley not sitting.

In *Jordan vs. Long,* 19 *So.* 843, there was considered the sufficiency of a notary's certificate of protest and demand of payment on a note. The certificate of protest was in due form, signed by the notary, and his seal affixed thereto. Under the same was written the following words:—"Delivered notice in person to C. E. Jordan, Florence, Alabama." There was no signature to this memorandum. It was contended by an endorser of the note that there was no notice of notificacation to him as the unsigned memroandum could not have been deemed to have been covered by the preceding signature of the notary.

The court said:—

> "We do not think that the certificate of the notary public of presentment for payment and notice was bad in any part on account of the fact that its recital of the giving of notice to the defendant was written below his official seal, and hence apart from the body of the certficate."

In *Andrews vs. Marshall,* 26 *Tex.* 212, there was under consideration the validity of a certificate of a

notary public to certain documents entitled to be of record in the registration of land titles. The court recognized the general rule that a notary's certificate must be signed, but said:—

> "The signature of the notary it is said is that which gives an instrument executed before him its character as a public instrument, and it cannot be considered authentic without it. If it were shown that the notary kept the originals in one volume for the year and signed at the end of the volume, this, it seems, would be sufficient."

So in the case at bar, it would seem to be sufficient as a substantial compliance with the statute for the notary to sign at the end of the page, the execution of the chattel mortgage as a whole being the one transaction, and the mortgagor being present, he executed the instrument, acknowledged it, swore to its being made in good faith.

More than this, as suggested by counsel for petitioner and appellant, his objection is a formal objection. The good faith of the parties is conceded. The immediate filing of the mortgage with the county auditor is undisputed. The requirements as to acknowledgement, affidavit and filing are formal in their nature, though required by the statute. No person can be injured by holding the mortgage valid. Without the mortgage the cars would not have been in the possession of the bankrupt. The trustee is now seeking to reap where the creditors have not sown, and we think this

a case where the language of the New York Court of Appeals, as italicized by Judge Parker, may well commend itself to the judgment of this court.

> *"I adopt this conclusion the more readily, because the objection is merely formal, the certificate, in its present form, furnishing all the security against error, and imposing upon the notary all the responsibility which it could do if another seal were added."*

Upon principle and the decisions of the court within and without this state, we are clear that the law is with us. If, however, the question were in doubt, then that construction of the statute should be adopted and that decision of this court rendered which will be in favor of the respondent and appellee under the well known theory of the law that such conclusions should be arrived at in doubtful cases as will attain substantial justice rather than those which will do *in justice.*

II.

It was unnecessary to record the chattel mortgage in question. It is a fact that as a general rule in this state for many years chattel mortgages have been filed and not recorded, and this is permitted under the statute. The court will take judicial knowledge of this fact, we believe. If it should not, we think that under the law it will take judicial knowledge that the statute permitting it, the filing only of a chattel mortgage

would be the customary practice of all persons loaning upon chattels.

The case of *Van Winkle vs. Micthum,* 66 *Wash.* 296, was one where the issue presented was, not whether a chattel mortgage securing the payment of over $300.00 must be recorded as well as filed, but whether such mortgage might be filed, recorded and then withdrawn from the records. In one section of the act in question, provision is made for the filing without recording of all chattel mortgages. An exception, however, is provided for in cases of mortgages of over $300.00, which may, under special permission given by the statute, be recorded and then withdrawn. It is true that in some cases, in construing the statutes, the word "may" may be read as being "must"; this upon the theory that it is manifest from the reading of the statute that such was the intention of the law makers. There is nothing in the consideration of the statute in question which leads to that view. Had the intention of the law makers been as contended for by an opposing counsel, Sec. 3660 of Remington's 1915 Codes and Statutes of Washington would have commenced to read as follows:—" A mortgage of personal property *securing the payment of the sum of* $300.00 *or a lesser amount* is void," etc. (Italics ours.)

It is apparent why the legislature of this state made the exception referred to in the case of mortgages securing the payment of more than $300.00. Let us

suppose that a railroad company, or other like corporation, owning personal property in many counties of the state, should desire to mortgage it to secure the payment of a bond issue. It could not have the mortgage on file in more than one county; this would be a physical impossibility. It would not then have any lien upon personal property in other counties. This then is one of the reasons for the legislative action.

The order of the district judge should be affirmed.

Respectfully submitted,

L. B. DONLEY,
ALEX M. WINSTON,
F. D. ALLEN,
Attorneys for Respondent and Appellee.

No. 3830

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF GEORGE R. JESSEE, Bankrupt, J. F. HERRICK, as Trustee of the Estate of George R. Jessee, Bankrupt, *Petitioner and Appellant,* *vs.* FIRST NATIONAL BANK OF COLVILLE, WASHINGTON, a corporation, *Respondent and Appellee.*	No. 3830 PETITION FOR REHEARING

L. B. DONLEY,
Coville, Washington.
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F. D. ALLEN,
1107 Paulsen Bldg.,
Spokane, Washington.
Attorneys for Respondent and Appellee.

Filed:_____Clerk

SHAW & BORDEN CO. 203022

FILED
JAN 30 1923

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The Respondent-Appellee respectfully petitions the Court to grant a rehearing of this cause.

INTRODUCTORY.

As we have no doubt that the majority has considered the reasoning of Judge Gilbert's dissenting opinion, we will not discuss the same in this petition. While agreeing with Judge Gilbert, we shall, for the purpose of this Petition and this petition only, concede that he is wrong. Likewise, and for the same reasons, we shall concede

that a chattel mortgage executed in the state of Washington must, as against existing creditors, contain an affidavit of good faith and an acknowledgment, which shall upon their face substantially comply with our local statutes, without the assistance of any extrinsic evidence.

ARGUMENT

THE REYNOLDS CASE

About a quarter of a century ago, Judge Hunt, speaking for the Supreme Sourt of Montana, decided the case of Reynolds vs. Fitzpatrick, 23 Montana, 52, 57 Pac. 452. The majority opinion in this case is bottomed on the Reynolds case, which latter case we have very carefully read. The statute of Montana there under consideration, like ours, require a chattel mortgage, as against creditors, to contain an affidavit of good faith and to be acknowledged. From the opinion in the Reynolds case, it does not appear that the mortgage there in question was acknowledged, but we take it that it was. It does appear that while the affidavit of good faith was signed by the parties, the Notary neither signed nor affixed his seal to the same. It is patent that no question was presented to the court in the Reynolds case as to whether the signature and seal to the acknowledgment could be as a matter of law, held to apply to the affidavit of good faith as well as to the acknowledgment. This question was not presented to any of the courts in any of the cases cited either in the Reynolds case or the majority opinion herein. We may remark in passing that, in

Whitehead vs. Hamilton Rubber Co., 53 N. J. Eq., 454, cited in Judge Gilbert's opinion, the case of Westerfield vs. Bried, 26 N. J. Eq., 357 is distinguished. An examination of these two cases will show the latter case is on all fours with the case at bar.

THE LAW OF WASHINGTON.

As the construction of our Washington statutes by our Washington courts is binding upon this court, let us see what the statute in question says and what our courts have said about the statute. Upon the question of the powers and duties of a Notary it is required that, save in court proceedings, when he shall "sign any instrument officially, he shall in addition to his name and the words 'notary public' *add his place of residence* and affix his official seal." (Rem. 1915 Code, Sec. 8299). It is therefore plain that in authenticating a chattel mortgage the notary must authenticate both the affidavit of good faith and the acknowledgment. Under our law, either the affidavit and acknowledgment must each be complete upon its face or reference may be had in the case of a formal defect in the affidavit, to the acknowledgment, or vice versa. In the one case the rule of strict construction and literal and technical compliance with the statute would be invoked. In the other case, the rule of liberal construction and a substantial compliance with the spirit of the statute would be invoked.

In Montana the rule at the time of the decision in the Reynolds case was that of strict construction. (See

page 454, 57 Pac.) In Washington the reverse and general rule is followed.

Vincent vs. Snoqualmie etc. Co., 7 Wash. 566.
Woods vs. Young Lumber Co., 107 *Wash.* 432.

We therefore see that the majority opinion, in passing upon a cause originating in the state of Washington, and involving the construction of Washington laws, has declined to follow that construction and principle of construction laid down by the Washington courts, has adopted another and different rule laid down by the Montana courts. In other words, it has decided a Washington case according to Montana law. When we say this, we do not intend to waive our theory that the question here involved was not submitted to Judge Hunt in the Reynolds case.

At this point we attach a copy of the form customarily used in chattel mortgages in this state being the form actually used in this case.

STATE OF WASHINGTON,
*County of*_____ } *ss.*

_____, being first duly sworn, on oath depose__ and say__, that __he__, _____mortgagor__ above named and that this mortgage is made in good faith without any design to hinder, delay or defraud creditors; and that __he__ do____ further swear that __he__ own__ said chattels as herein described and they are free and clear from any encumbrances or liens, excepting the within mortgage.

Subscribed and sworn to before me this_____ day of _____, 19____

Notary Public in and for the State of Washington,
residing at _____

STATE OF WASHINGTON,
*County of*_____ } *ss.*

On this_____day of_____A. D. 19__, before me, a Notary Public in and for said state, personally appeared _____, to me known to be the individual__described in and who executed the within instrument and acknowledged that __he__ signed and sealed the same as _____ free and voluntary act and deed, for the uses and purposes therein mentioned.

WITNESS My hand and official seal the day and year in this certificate first above written.

Notary Public in and for the State of Washington,
residing at _____

It will be noted that both the affidavit and the acknowledgment are apparently separate instruments. That as to the attestation clause, the blanks require two signatures by the notary and the insertion of his place of residence in two places. He is also required to affix two seals if a strict and technical rule shall be invoked. We have therefore three statutory essentials to a valid notarial act (a) signature, (b) the residence, (c) the seal.

Under the law, so far as the legislative will is concerned, it is patent that neither one or the other of these requirements may be given more effect than the others. Yet, what has the Washington Supreme Court held? In the Vincent case, it held that where there were two seals, two notarial signatures, one notarial address in the acknowledgment, but none in the affidavit, that reference could be made to the address in the acknowledgment and the mortgage was valid. In the Woods case, it held that where there were two signatures, two addresses, one seal and that in the acknowledgment, that the affidavit of good faith, being without a seal, could be aided by applying to it the seal to the acknowledgment. The language of the Supreme court of Washington in the Woods case is illuminating on this question. It is said:

> "We are quite convinced, however, that, under our statute, there is nothing preventing the notary evidencing the two acts by one certificate, and that, under the circumstances here shown, he may be considered as having done so, in so far as the attaching of his official seal is concerned."

It will be observed that neither in the Woods case or in the case therein cited is it said that, as a matter of fact, the notary intended the one seal to apply to the two instruments. Our common sense teaches us that the contrary was the fact.

In the Woods case and cases therein cited, in the Vincent case and in the case at bar it is evident that the omission of the address, the seal and the signature, respectively were but oversights. The law in regard thereto has been fixed by the Supreme court of the state of Washington. It is, in our opinion, the duty of this Court to follow it. It is a wholesome rule, founded on good faith and fair play, as is said in the Woods case. If the opinion of the learned district judge shall finally be declared to be the law of this cause, then upon questions involving the validity of chattel mortgages, the federal and state courts in this state will be in accord. If, on the other hand, the majority opinion shall stand as the law, then the law in the two jurisdictions will be in hopeless conflict. Then indeed, will subordinate courts in the diverse jurisdictions be at sea in deciding causes. It is this diversity of judicial opinions and decisions which is endeavored to be avoided by the rule that the construction given state statutes by state courts is binding upon federal courts and the construction given federal statutes by federal courts of last resort is binding upon state courts. This rule should be applied here.

In conclusion, we are aware of the difficulty in attempting to change the views apparently maintained by

Judge Hunt for nearly a quarter of a century. We however, suggest that as hereinbefore indicated, first, that the question here presented, was not presented to him in the Reynolds case; and, secondly, that there, he was deciding in Montana a case arising upon a Montana statute, in a state where the doctrine of strict construction was in force. Here, the statute is a Washington statute, and the doctrine of liberal construction applies.

For the reasons given, we believe this petition should be granted.

Respectfully submitted,

L. B. DONLEY,
ALEX M. WINSTON,
F. D. ALLEN,
Attorneys for Respondent and Appellee.

No. [illegible]

United States
Circuit Court of Appeals
For the Ninth Circuit.

18

WM. H. MOORE, JR., as Trustee in Bankruptcy of the Estate of Kimball & Webb, a partnership composed of Harry J. Kimball, Jr., and Rex Webb, and Harry J. Kimball, Jr., and Rex Webb, as individuals, bankrupt,

Appellant,

vs.

T. E. RISLEY,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

FILED
JAN 24 1922
F. D. MONCKTON,
CLERK

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No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

WM. H. MOORE, JR., as Trustee in Bankruptcy of the Estate of Kimball & Webb, a partnership composed of Harry J. Kimball, Jr., and Rex Webb, and Harry J. Kimball, Jr., and Rex Webb, as individuals, bankrupt,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Wm. H. Moore, Jr., Trustee in Bankruptcy, Petitioner and Appellant:

ELMORE WINKLER, Esq., and

W. T. CRAIG, Esq., Board of Trade Rooms, Higgins Building, Los Angeles, Cal.

For T. E. Risley, Respondent and Appellee:

FRANK KAUKE, Esq., Fresno, Cal.

CITATION.

United States of America, ss.

To T. E. RISLEY GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, on the 27th day of January A. D. 1922, pursuant to the appeal duly obtained and filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain controversy arising in the matter of Kimball & Webb, a partnership composed of Harry J. Kimball, Jr. and Rex Webb, and Harry J. Kimball, Jr., and Rex Webb as individuals, Bankrupt, now pending in the District Court of the United States for the Southern District of California, Northern Division, and being case No. 767 in Bankruptcy of said Court, wherein Wm. H. Moore, Jr., as Trustee in Bankruptcy of the estate of said Kimball & Webb, Bankrupt is Appellant, and you are Appellee to show cause, if any there be, why the Minute order entered in said District Court on the 19th day of December, 1921, affirming the order dated November 8th, 1921, heretofore made in said Bankruptcy proceedings by Clyde H. Thompson, Esq., Referee in Bankruptcy, denying the prayer of the petition of said Wm. H. Moore, Jr., filed in said proceeding and dischargeing the rule of the order to show cause issued on said petition, in the said bankruptcy proceeding mentioned, should not be corrected, and

speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable BENJAMIN F. BLEDSOE United States District Judge for the Southern District of California, this 30th day of December, A. D. 1921, and of the Independence of the United States, the one hundred and forty fifth

Bledsoe

U. S. District Judge for the Southern District of California.

Receipt of copy of the foregoing Citation is hereby admitted this 4th day of January, 1922.

Frank Kauke

Attorney for Respondent and Appellee.

Endorsed: ORIGINAL No. *767* - Bkcy—*In the* United States Circuit Court of Appeals *for the* NINTH CIRCUIT WM. H. MOORE, JR., as Trustee in Bankruptcy of the Estate of Kimball & Webb, a partnership, composed of Harry J. Kimball, Jr and Rex Webb, and Harry J. Kimball, Jr. and Rex Webb as individuals; Appellant *vs.* T. E. RISLEY Appellee Citation FILED Jan 9 - 1922 at 55 min. past 10 o'clock A. M. *CHAS. N. WILLIAMS, Clerk,* Murray E. Wire, *Deputy.*

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

---oOo---

In the Matter of KIMBALL & WEBB, a partnership composed of Harry J. Kimball, Jr., and Rex Webb, and Harry J. Kimball, Jr., and Rex Webb, as individuals, Bankrupts.	In Bankruptcy, No. 767. ORDER OF REFEREE.

WHEREAS, in the above entitled matter, Wm. H. Moore, Jr., Trustee in Bankruptcy herein, presented and filed his petition praying that an order be made herein requiring T. E. Risley to be and appear before said Court to show cause why an order should not be made and entered herein decreeing that the lease of the premises designated by the number 1141 J Street, in the City of Fresno, in the County of Fresno, State of California, originally made by and between T. E. Risley, as lessor, and Rex Webb, J. H. Koll and H. J. Kimball, Jr., as lessees, bearing date the 4th day of October, 1919, and being a lease originally made for the term of ten years, commencing on the 1st day of January, 1920, is an asset of the above named bankrupt estate, and directing said trustee to sell said lease as an asset of said estate, and restraining said T. E. Risley, his agent and attorneys, from

in any way interfering with such sale, or the purchaser thereat, and from any way stating or claiming that said bankrupt has no interest in said lease or leasehold interest, or that said lease or leasehold interest has been terminated; and,

WHEREAS, an order to show cause was issued herein in accordance with the prayer of said petition, and the said T. E. Risley on the 25th day of October, 1921, made and filed herein his answer thereto, and said matter was duly set for hearing before the undersigned Referee on the 5th day of November, 1921; and,

WHEREAS, the said Wm. H. Moore, Jr., as such trustee, petitioner, and the said T. E. Risley, respondent herein, by their respective counsel, on the 5th day of November, 1921, made and filed herein a stipulation containing an agreed statement of the facts; and,

WHEREAS, thereafter on said 5th day of November, 1921, said matter came on regularly for hearing and determination before the undersigned Referee, upon the petition of the said trustee, the answer thereto of the said T. E. Risley, and the agreed statement of facts herein, and, after argument by Messrs. H. R. Archbald and Elmore Winkler, as attorneys for petitioner, and by Frank Kauke, as attorney for the respondent, the matter was submitted to the undersigned Referee for consideration and decision, and said matter having been duly considered, the said Referee, upon the said petition and answer and the facts so stipulated and agreed upon by the respective parties

hereto, does now find and declare his conclusions of law therefrom as follows, to wit:

That said lease has been terminated and is at an end, and that the same is not an asset of the above named bankrupt estate.

That neither the said petitioner nor the said J. H. Kimball, Jr., or Rex Webb, has any right whatsoever under said lease, nor any right to sell, assign or dispose of the same.

That the said T. E. Risley is entitled to the possession of said leased property.

And by reason of the agreed facts, and the said conclusions of law, it is now hereby ordered and adjudged that the said order to show cause be and the same is discharged; and that the petition of the said trustee is denied.

Dated this 8th day of November, 1921.

CLYDE H. THOMPSON.

Referee.

Endorsed: In Bankruptcy No. 767. IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION. In the Matter of KIMBALL & WEBB, a partnership composed of Harry J. Kimball, Jr., and Rex Webb, and Harry J. Kimball, Jr., and Rex Webb, as individuals, Bankrupt. ORDER OF REFEREE FILED November 8th, 1921 at 10 o'clock A. M. CLYDE H. THOMPSON, Referee. FILED Jan 13 1922 at 35 min. past 1 o'clock P. M.

CHAS. N. WILLIAMS, Clerk Murray E. Wire, *Deputy.*

ORIGINAL

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION

In Bankruptcy No. *767.*

In the Matter of	)
	)
KIMBALL & WEBB, a partnership composed of HARRY J. KIMBALL, JR. and REX WEBB, and Harry J. Kimball, Jr. and Rex Webb, as individuals,	) STATEMENT)OF THE CASE) ON APPEAL.))
Bankrupt.	)

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STATEMENT OF FACTS.

Shortly prior to October 4th, 1919, Rex Webb, J. H. Koll and H. J. Kimball, Jr., contemplated commencing and transacting a gents furnishing and clothing business at No. 1141 J Street, Fresno, California. On October 4th, 1919, a lease for said premises was made in duplicate, T. E. Risley, respondent herein and the owner of said premises being the lessor named therein and said Rex Webb and H. J. Kimball, Jr., with one J. H. Koll being named as lessees therein; that said lease was for a period of ten years, com-

mencing January 1st, 1920, and ending December 31st, 1929, and contained the following express terms and conditions:

"And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and remove all persons therefrom without notice***

It is hereby covenanted and agreed that this lease and the interest of said lessee hereunder shall not without the written consent of said lessor first had and obtained, be subject to garnishment or sale under execution in any suit or proceedings which may be brought against or by said lessees, and that this lease and all the rights of said lessees hereunder, shall, at the option of the lessor cease and terminate upon said lessees being by any court adjudged bankrupt or insolvent, or upon said lessees making an assignment for the benefit of creditors."

On or about January 1st, 1920, said lessees took possession of said premises and installed certain improvements therein.

Before any merchandise was actually moved into the building and business opened, Koll severed his connection with Rex Webb and H. J. Kimball, Jr., and there was prepared duplicate copies of the following, which were signed by the parties and attached to the lease.

"For value received, I hereby sell and assign to Rex Webb and H. J. Kimball, Jr., all my right, title and interest in and to the attached lease.

Fresno, Cal.

J. H. Koll

And in consideration of the foregoing assignment to us, we hereby agree to be bound by and comply with all the terms and conditions of said lease.

Fresno, Cal. Rex Webb

H. J. Kimball, Jr.

And in consideration of the foregoing promise and agreement, I consent to said assignment.

Fresno, Cal."

T. E. Risley,"

Said Rex Webb and H. J. Kimball continued in possession of said premises and paid the rent as it fell due out of the proceeds of said business until the 24th day of July, 1921, when possession of said premises was taken by Wm. H. Moore, Jr., who was appointed Receiver in Bankruptcy herein on an involuntary petition in bankruptcy filed against Kimball & Webb, a partnership composed of said H. J. Kimball, Jr., and said Rex Webb, and against said H. J. Kimball, Jr., and Rex Webb, as individuals. That said Receiver paid the rent for said premises on August 1st, 1921, for the month of August, said year.

That on the 15th day of August, 1921, said partnership of Kimball & Webb and said H. J. Kimball, Jr., and said Rex Webb, as individuals, were each ad-

judged bankrupt herein. Said J. H. Koll has not been adjudged bankrupt.

On the 8th day of August, 1921, Wm. H. Moore, Jr., Receiver in said bankruptcy, sent to T. E. Risley a communication in writing as follows:

"T. E. Risley,
c/o Sam Trotter,
Monterey, California.

Dear Sir:

Please be advised that an involuntary petition in bankruptcy has been filed against Kimball & Webb of Fresno who have been occupying a store at 1151 J Street in your building. The undersigned has been appointed Receiver by the Court.

In looking over the lease I note that the original lessees were Rex Webb, J. H. Koll and H. J. Kimball. I also note that there is a provision in the lease to the effect that the lease and all the rights of the lessees therein shall, at the option of the lessor cease and terminate upon said lessee being by the Court adjudged bankrupt or insolvent. In this connection I might add that Mr. J. H. Koll, one of the lessees, has not been adjudged bankrupt and it would therefore seem to me that this provision of the lease which I have just cited will be inoperative in the present instance, but however that may be, I desire to inquire your attitude in respect to an assignment of the lease to such responsible party as I may be able to find who will take over the business of Kimball & Webb.

A great many responsible parties have inquired concerning the purchase of the stock of merchandise, store furniture and fixtures but each and every one of them are very much interested in knowing whether the lease can be assigned. I believe your agent at Fresno has indicated to my representative there that in all probability you would consent to the assignment of the lease to a responsible party.

May I ask you to kindly let me have your views on the matter so that I may be guided in the administration of the estate along lines that will be to the best interests of all parties interested. Kindly confer the courtesy of an early response on,

Yours truly,
Wm. H. Moore, Jr.,
Receiver."

Under date of August 10th, 1921, T. E. Risley replied to the above communication in words as follows:

"Wm. H. Moore,
Receiver in Bankruptcy,
704 Higgins Building,
Los Angeles, Cal.

Dear Sir:

I have before me your letter of the 8th inst. in re Kimball & Webb bankruptcy matter.

I beg to advise you that I have attached to my copy of my lease with Kimball & Webb an assignment of the J. H. Koll interest in the lease to Kimball & Webb. This assignment was made in duplicate, I

kept one copy and personally handed Kimball the other copy with the request that he attach the same to his copy of his lease. This I believe clears up the apparent situation as set out by you in the matter of the lease being terminated by their act of bankruptcy. My lease is with my papers in Fresno, where I will return Sept. 1st, at which time I will be pleased to exhibit it to your representative.

In the matter of my assigning the Kimball & Webb lease I take the position that in that you as Receiver in Bankruptcy in the U. S. District Court have officially advised me that Kimball & Webb are involuntary bankrupts and in that the lease they held with me provided to the effect that the lease and all the rights of the lessees therein shall, at the option of the lessor, cease and terminate upon said lessee being by the Court adjudged bankrupt or insolvent, therefore I will consider the lease terminated at the time the court decides that Kimball and Webb to be bankrupt.

Considering that the lease will be terminated at the above stated time I will then be in a position to enter into a new lease with new people on terms and conditions to be decided at the time.

If it will assist you in disposing of the stock and fixtures I would be very glad to talk lease with responsible people. Of course, you can readily understand that the new lease will call for a material increase in the rental. Mr. W. G. Wharton at 1933 Fresno St., Fresno, my agent, is somewhat conversant with my desires in the matter of a tenant so your

Fresno representative may take up prospective tenants with him during my absence.

Trusting I am made myself clear, I am,

Yours very truly,

T. E. Risley."

Following said communications Mr. Moore caused to be handed to Mr. Risley a check, dated August 30, 1921, for the sum of $350.00, signed by Wm. H. Moore, Jr., Receiver of the estate of Kimball & Webb, bankrupt, and countersigned by Clyde H. Thompson, Referee in Bankruptcy, on the back of which was the following writing: September 1921 rental of store at 1141 J Street, Fresno, under lease dated October 4, 1919, $350.00."

On receipt of said check Mr. Risley took same to said Referee and told him that he intended to exercise his option under the lease to cancel it, Kimball and Webb having been adjudged bankrupt, and asked the Referee if he would forfeit his right so to do if he accepted the check considering the indorsement. The Referee stated to Mr. Risley that he did not think the Receiver intended to take any advantage of him in that particular.

Thereafter Mr. Risley obliterated the following words and figures of the indorsement, viz., "under lease dated Oct. 4, 1919, $350.00," and Mr. Risley then indorsed and cashed said check.

The following month, Mr. Moore, having been elected Trustee of said estate in the meantime, he

caused to be delivered to Mr. Risley another check, dated October 1, 1921, for the sum of $350.00, signed by Mr. Moore as such Trustee and countersigned by the Referee, for the sum of $350.00, with the following indorsement, "Oct. rental under lease, $350.00."

On receipt of said check Mr. Risley obliterated the words and figures "under lease, $350.00," and thereupon cashed said check.

On or about the 20th day of September, 1921, the said T. E. Risley caused to be delivered to each of said Wm. H. Moore, Jr., Trustee, and H. J. Kimball, Jr., and Rex Webb, a written notice, stating in substance that on August 15th, 1921, said Harry J. Kimball, Jr., and Rex Webb were adjudged bankrupt, and that by virtue of the provisions of said lease said lessor exercised his option to terminate said lease, and the rights of the lessees and of said Wm. H. Moore, Jr., Trustee in Bankruptcy of said estate, and any and all persons claiming or to claim under said lessees and said Trustee, and demanded possession of said premises.

The unexpired term of said lease is of a value in excess of the rental required to be paid therefor.

PROCEEDINGS OF THE CONTROVERSY.

On or about the 7th day of October, 1921, said Trustee in Bankruptcy filed his petition with Clyde H. Thompson, Esquire, the Referee in Bankruptcy of said Court, to whom said bankruptcy matter was referred, praying for the issuance of an order to show

cause, requesting said T. E. Risley to show cause before said Referee, why an order should not be made and entered by said Referee, decreeing said lease to be an asset of said bankrupt estate, directing said Trustee to sell the same as such asset, and restraining said Risley, his agents and attorneys from in any way interfering with said sale or the purchaser thereat. An order to show cause was issued by said Referee as prayed for, returnable October 25th, 1921, at which time said T. E. Risley answered said petition and order to show cause alleging that said lease and all rights under the same were terminated by the lessor having exercised his option so to do under the covenant of the lease upon the adjudication of said Kimball and Webb, a bankrupt.

A hearing was had in the office of said Referee on November 5th, 1921, on an agreed statement of facts, and said Referee made an order November 8th, 1921, discharging the rule of said order to show cause and denying said petition. Said Trustee filed his petition with said Referee for a review of said order by the District Court, whereupon said Referee prepared and filed in said District Court of the United States his certificate on review. The question on review was argued before said District Court on December 19th, 1921, and submitted, whereupon the minute order of said Court from which this appeal is taken was made and entered on said 19th day of December, 1921, affirming the order of said Referee.

The question presented by this appeal is: Was said lease and all rights under it terminated under the facts of the case, or is said lease still in force and effect and the property of the Trustee in Bankruptcy, he having elected to accept the same as an asset, and it is stipulated that said question can be determined by the Appellate Court without an examination of the pleadings filed in said controversy and by reference only to the papers and records mentioned in the praecipe for transcript of record filed herein.

Elmore Winkler and W. T. Craig,
Attorneys for Petitioner, Wm. H. Moore, Jr., as Trustee in Bankruptcy.

Frank Kauke,
Attorney for Respondent, T. E. Risley.

The foregoing statement of the case on appeal is hereby approved.

DATED: December 29th, 1921.

Bledsoe
United States District Judge.

Endorsed: ORIGINAL *No. 767* In United States District Court Southern District of California Northern Division *In the Matter of* KIMBALL & WEBB *Bankrupt* STATEMENT OF THE CASE ON APPEAL. FILED Dec. 29 1921 at 45 min. past 4 o'clock P. M. *CHAS. N. WILLIAMS, Clerk* Douglas Van Dyke, *Deputy.* W. T. CRAIG & Elmore Winkler BOARD OF TRADE ROOMS HIGGINS BUILD-

ING TELEPHONES: HOME 10112, SUNSET MAIN 4622
LOS ANGELES CAL. *Attorney for*————————

At a stated term, to wit, the JULY Term, A. D. 1921, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the court room thereof, in the city of Los Angeles on Monday the Nineteenth day of December in the year of our Lord one thousand nine hundred and twenty one.

Present: THE HONORABLE BENJAMIN F. BLEDSOE, District Judge.

In the Matter of	)	
	)	
Kimball & Webb,	)	No. 767 Bkcy. N. D.
a partnership, etc.,	)	
	)	
Bankrupts.	)	

-------ooOoo-------

This matter coming on regularly at this time for hearing on Review of Referee's Order; Elmore Winkler, Esq. and H. R. Archbald, Esq. appearing as counsel for petitioner, and Frank Kauke, Esq. appearing as counsel for respondent, T. E. Risley; and this matter having been called and respective counsel having answered ready, and H. R. Archbald, of counsel as aforesaid, having made argument in support of petition for Review of Referee's Order, and Elmore Winkler, Esq., having made argument in support of

Petition for Review and Frank Kauke having made argument in opposition to the Petition for Review and H. R. Archbald, Esq. having made argument in rebuttal, it is now ordered by the Court that the Order of the Referee entered herein be and the same hereby is affirmed.

ORIGINAL.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION

In Bankruptcy No. *767*

In the Matter of)	
)	
KIMBALL & WEBB, a partnership composed of HARRY J. KIMBALL, JR. and REX WEBB, and Harry J. Kimball, Jr., and Rex Webb as individuals,)	NOTICE OF APPEAL.
)	
Bankrupt.)	

.

To T. E. Risley, and to Frank Kauke, Esquire, his Attorney, and

To Chas. N. Williams, Clerk of the District Court of the United States for the Southern *Dirict* of California:

YOU, and EACH OF YOU, will please take notice that Wm. H. Moore, Jr., as Trustee in Bankruptcy

of the estate of Kimball & Webb, a partnership composed of Harry J. Kimball, Jr. and Rex Webb, and Harry J. Kimball, Jr. and Rex Webb, as individuals, hereby appeals from the minute order entered herein on the 19th day of December, 1921, affirming the order dated November 8th, 1921, heretofore made herein by Clyde H. Thompson, Esquire, Referee in Bankruptcy, denying the prayer of the petition of said Wm. H. Moore, Jr., heretofore filed herein and discharging the rule of the order to show cause issued on said petition relative to the lease mentioned and described in the order of said Referee in Bankruptcy, to the Circuit Court of Appeals for the Ninth Circuit to be holden in and for said Circuit in the City and County of San Francisco, in the state of California.

DATED: this 22nd day of December, 1921.

Elmore Winkler and W. T. Craig
Attorneys for said Trustee and Petitioner.

Endorsed: ORIGINAL *No. 767* In United States District Court Southern District of California Northern Division *In the Matter of* KIMBALL & WEBB *Bankrupt* NOTICE OF APPEAL FILED Dec 29 1921 at 40 min. past 2 o'clock P. M. *CHAS. N. WILLIAMS, Clerk* Douglas Van Dyke, *Deputy. Service of the within* Notice of Appeal *is hereby admitted this 27th day of December 1921* FRANK KAUKE *Attorney for* Respondent, T. E. Risley, W. T. CRAIG Elmore Winkler BOARD OF TRADE ROOMS HIGGINS BUILDING TELEPHONES: HOME

10112, SUNSET MAIN 4622 LOS ANGELES CAL.
Attorney for ————————————

ORIGINAL

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

In Bankruptcy No. 767.

In the Matter of KIMBALL & WEBB, a partnership composed of HARRY J. KIMBALL, JR. and REX WEBB, and Harry J. Kimball, Jr. and Rex Webb, as individuals, Bankrupt.	PETITION FOR ALLOWANCE OF APPEAL AND ORDER ALLOWING SAME.

To the Honorable Judges of the United States District Court, for the Southern District of California, Northern Division:-

Wm. H. Moore, Jr., as Trustee in Bankruptcy of the estate of Kimball & Webb, a partnership composed of Harry J. Kimball, Jr., and Rex Webb, and Harry J. Kimball, Jr. and Rex Webb, as individuals, conceiving himself *agreed* by the minute order entered in the above entitled matter on the 19th day of December, 1921, affirming the order of Clyde H. Thomp-

son, Esquire, Referee in Bankruptcy of this Court, to whom the above matter was referred, said order being dated November 8th, 1921, denying the petition of said Wm. H. Moore, Jr., as such Trustee, and discharging the rule of the order to show cause issued thereon against T. E. Risley, does hereby petition for an appeal from the said minute order to the United States Circuit Court of Appeals for the Ninth Circuit and prays that this appeal may be allowed and a citation granted directed to said T. E. Risley, commanding him to appear before the United States Circuit Court of Appeals for the Ninth Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of the records, proceedings and evidence in said proceeding, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Wm. H. Moore, Jr.
Trustee in Bankruptcy of the Estate of
Kimball & Webb, a partnership, etc.

Elmore Winkler and W. T. Craig
Attorneys for Trustee and Petitioner.

The foregoing appeal is hereby allowed, no bond being required of petitioner under section 25c of the Bankruptcy Act.

DATED: December 29th, 1921.

Bledsoe
United States District Judge.

Endorsed: ORIGINAL *No. 767* In United States District Court Southern District of California North-

ern Division *In the Matter of* KIMBALL & WEBB *Bankrupt* PETITION FOR ALLOWANCE OF APPEAL AND ORDER ALLOWING SAME. FILED Dec 29 1921 at 40 min. past 2 o'clock P. M. *CHAS. N. WILLIAMS, Clerk* Douglas Van Dyke, *Deputy. Service of the within* Petition for Appeal *is hereby admitted this 27, day of* Dec. *1921* Frank Kauke *Attorney for* Respondent, T. E. Risley W. T. CRAIG & Elmore Winkler BOARD OF TRADE ROOMS HIGGINS BUILDING TELEPHONES: HOME 10112, SUNSET MAIN 4622 LOS ANGELES CAL. *Attorney for*————————————————

ORIGINAL

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

In Bankruptcy No. 767.

In the Matter of	)	
	)	
KIMBALL & WEBB, a partnership composed of HARRY J. KIMBALL, JR. and REX WEBB, and Harry J. Kimball, Jr. and Rex Webb, as individuals,	)	ASSIGNMENT OF ERRORS.
	)	
Bankrupt.	)	

.
.

Comes now Wm. H. Moore, Jr., as Trustee in Bankruptcy of the estate of Kimball & Webb, a partnership

composed of Harry J. Kimball, Jr. and Rex Webb, and Harry J. Kimball, Jr. and Rex Webb, as individuals, and files the following assignment of errors:-

First: The United States District Court for the Southern District of California, Northern Division, erred in affirming the order of Clyde H. Thompson, Esquire, Referee in Bankruptcy herein, dated November 8th, 1921, holding that the lease between T. E. Risley as lessor, and Rex Webb, J. H. Koll and H. J. Kimball, Jr., as lessees, was terminated and at an end, and that the same is not an asset of the above named bankrupt estate and that said Trustee has no right whatsoever in said lessee or any right to sell, assign or dispose of the same, and that said T. E. Risley is entitled to the possession of the property covered by said lease.

Second: That said Court erred in holding that there was a violation of the covenants in said lease providing that all rights of the lessees thereunder should at the option of the lessor cease and terminate upon said "lessees being by any Court adjudged bankrupt", one of said lessees, to-wit: J. H. Koll, not having been adjudged bankrupt.

Third: Said Court erred in holding that the acceptance of rent by said T. E. Risley under the circumstances of the case was not a waiver of any breach of the covenants providing for forfeiture of said lease by said Risley.

Fourth: Said Court erred in not disaffirming the order of said Referee and in not holding that said

lease was and is in full force and effect and the property of Wm. H. Moore, Jr., as Trustee in Bankruptcy of the estate of the above named bankrupt.

Elmore Winkler and W. T. Craig
Attorneys for said Trustee and Petitioners.

Endorsed: ORIGINAL *No. 767* In United States District Court Southern District of California Northern Division *In the Matter of* KIMBALL and WEBB *Bankrupt* ASSIGNMENT OF ERRORS FILED Dec 29 1921 at 40 min. past 2 o'clock P. M. *CHAS. N. WILLIAMS, Clerk,* Douglas Van Dyke, *Deputy. Service of the within* Assignment of Errors *is hereby admitted this 27 day of Dec. 1921* FRANK KAUKE *Attorney for* Respondent, T. E. Risley W. T. CRAIG & Elmore Winkler BOARD OF TRADE ROOMS HIGGINS BUILDING TELEPHONES: HOME 10112, SUNSET MAIN 4622 LOS ANGELES CAL. *Attorney for*————————

ORIGINAL

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

In Bankruptcy No. 767.

In the Matter of)	
)	
KIMBALL & WEBB, a)	
partnership composed of)	
HARRY J. KIMBALL,)	PRAECIPE FOR
JR. and REX WEBB, and)	TRANSCRIPT OF
Harry J. Kimball, Jr. and)	RECORD.
Rex Webb, as individuals,)	
)	
Bankrupt.)	

To Chas. N. Williams, Clerk of United States District Court for the Southern District of California:-

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above entitled proceeding, and to include in such transcript the following portions only of said record:

1. Statement of the case on appeal,
2. Order of Clyde H. Thompson, Referee, dated November 8th, 1921, discharging the rule of the order to show cause against T. E. Risley and denying the petition of Wm. H. Moore, Jr., Trustee in Bankruptcy herein.

3. Minute order of District Court of December 19th, 1921, affirming said Referee's order of November 8th, 1921, on hearing on review.
4. Notice of Appeal.
5. Petition for allowance of appeal and order allowing same.
6. Assignment of errors.
7. Citation on appeal.
8. Praecipe for transcript of record.

Elmore Winkler and W. T. Craig
Attorneys for Wm. H. Moore, Jr., Trustee in Bankruptcy, and Petitioner.

Receipt of a copy of the foregoing Praecipe is hereby admitted this 27th day of December, 1921.

Frank Kauke
Attorney for T. E. Risley, Respondent.

Endorsed: ORIGINAL *No. 767* In United States District Court Southern District of California Northern Division *In the Matter of* KIMBALL & WEBB *Bankrupt* PRAECIPE FOR TRANSCRIPT OF RECORD FILED Jan. 9 - 1922 at 55 min. past 10 o'clock A. M. *CHAS. N. WILLIAMS, Clerk,* Murray E. Wire, *Deputy* W. T. CRAIG & Elmore Winkler BOARD OF TRADE ROOMS HIGGINS BUILDING TELEPHONES: HOME 10112, SUNSET MAIN 4622 LOS ANGELES CAL. *Attorney for*————————

STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

WM. H. MOORE, JR., Trustee in Bankruptcy, *Appellant*,
vs.
T. E. RISLEY, *Appellee*.

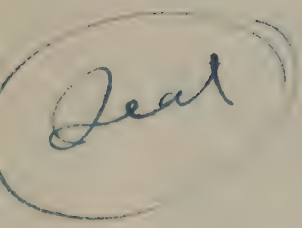
I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 28 pages, numbered from 1 to 28 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation on appeal, order of referee, statement of the case on appeal, minute order of Dec. 19th, 1921, notice of appeal, petition for allowance of appeal and order allowing same, assignment of errors, and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $8.80 and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America,

in and for the Southern District of California, Southern Division, this 19th day of January, in the year of our Lord One Thousand Nine Hundred and Twenty-one, and of our Independence the One Hundred and Forty-sixth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.



By P. S. Zimmerman
Deputy.

No. 3831.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Wm. H. Moore, Jr., as Trustee in Bankruptcy of the Estate of Kimball & Webb, a Partnership Composed of H. J. Kimball, Jr., and Rex Webb, and H. J. Kimball, Jr., and Rex Webb as Individuals, Bankrupt,

Appellant,

vs.

T. E. Risley,

Appellees.

BRIEF FOR APPELLANT.

W. T. Craig,
Elmore Winkler,
Attorneys for Appellant.
H. R. Archbald,
Of Counsel for Appellant.

Parker & Stone Co., Law Printers, 232 New High St., Los Angeles, Cal.

FILED
APR 22 1922
F. D. MONCKTON,

No. 3831.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Wm. H. Moore, Jr., as Trustee in Bankruptcy of the Estate of Kimball & Webb, a Partnership Composed of H. J. Kimball, Jr., and Rex Webb, and H. J. Kimball, Jr., and Rex Webb as Individuals, Bankrupt,

Appellant,

vs.

T. E. Risley,

Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This controversy comes before this court on an appeal from an order of the United States District Court for the Southern District of California, affirming an order theretofore made by Clyde H. Thompson, Esq., the referee in bankruptcy of said court, to whom the matter of the bankruptcy involved here was referred,

the order of said referee holding that the lease in question here had been terminated and is not an asset of said bankrupt estate, and that the petitioner in said proceedings (appellant here) has no right to sell, assign, or dispose of the same, and that the respondent (appellee here) is entitled to the possession of the leased premises, and dismissing the petition of appellant filed for the purpose of determining whether or not said lease constituted an asset of said estate.

The lessees in the lease in question are Rex Webb, H. J. Kimball, Jr. (who are the bankrupts in the proceeding in which this controversy arises), and one J. H. Koll [Transcript, page 7], and T. E. Risley, appellee herein, is the lessor. By said lease it is provided that "this lease and all the rights of said lessees hereunder shall, at the option of the lessor, cease and terminate upon said lessees being by any court adjudged bankrupt or insolvent." [Transcript, page 8.]

Appellant contends:

First: That under facts of the case there was no violation of the condition of the lease providing for a termination of the same upon the lessees being adjudicated bankrupt; and,

Second: That if there was a breach of the condition and forfeiture, the same was waived.

Specification of Errors.

Appellant contends that the lower court erred:

First: In affirming the order of Clyde H. Thompson, Esquire, referee in bankruptcy herein, dated

November 8th, 1921, holding that the lease between T. E. Risley as lessor, and Rex Webb, J. H. Koll and H. J. Kimball, Jr., as lessees, was terminated and at an end, and that the same is not an asset of the above named bankrupt estate and that said trustee has no right whatsoever in said lessee or any right to sell, assign or dispose of the same, and that said T. E. Risley is entitled to the possession of the property covered by said lease.

Second: That said court erred in holding that there was a violation of the covenants in said lease providing that all rights of the lessees thereunder should at the option of the lessor cease and terminate upon said "lessees being by any Court adjudged bankrupt," one of said lessees, to-wit: J. H. Koll, not having been adjudged bankrupt.

Third: Said court erred in holding that the acceptance of rent by said T. E. Risley under the circumstances of the case was not a waiver of any breach of the covenants providing for forfeiture of said lease by said Risley.

Fourth: Said court erred in not disaffirming the order of said referee and in not holding that said lease was and is in full force and effect and the property of Wm. H. Moore, Jr., as trustee in bankruptcy of the estate of the above named bankrupt.

POINTS AND AUTHORITIES ON FIRST CONTENTION.

It is a stipulated fact that but two of the lessees have been adjudged bankrupt; that the third lessee has not been so adjudged, and appellant contends that the condition of the lease is not violated unless all of the lessees have been so adjudged bankrupt.

This being a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. (Section 1442, Civil Code of California.)

> "That the condition in a lease calling for a forfeiture is to be strictly construed against the lessor is a universal rule recognized by all the authorities. It has been declared that a provision for the forfeiture of a lease will always be construed so as to prevent rather than aid the forfeiture."
>
> Jones on Landlord and Tenant, Sec. 468.
>
> "The courts have always held a very strict hand over these conditions for defeating leases. Very easy modes have always been countenanced for putting an end to them. The lessor, if he pleased, might certainly have provided against the change of occupancy as well as against an assignment, but he has not done so by words which admit of no other meaning."
>
> Crusoe v. Bugby, 3 Wils. 234, 2 W. Bl. 766.

> "Covenants of this description are construed by courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation."
>
> Taylor on Landlord and Tenant, Sec. 403.

In Hasbrook v. Paddock, 1 Barb. 635, it was held that a lease of a lot which provided for a forfeiture, if the lot should be used for purposes other than the manufacture of salt, was not forfeited by the use of a part of the lot for other purposes.

In the case of Jackson v. Silvernail, 15 Johns, 278, the subletting of a part of leased premises for less than the full term was held not to violate lessee's covenant in the original lease "to not sell and dispose of, or assign their estate in the demised premises," the court holding that the assignment meant the whole estate and not a mere subletting, the court saying that "the plaintiff's right is *stricti juris,* and to enable him to recover on the ground of forfeiture, he must bring his case within the penalty on the most literal and rigid interpretation of the covenants"

In the case of Lynde v. Hough, 27 Barb. 415, it was held that a covenant "not to let or underlet the whole or any part" of the demised premises did not preclude an assignment of the whole interest.

The three foregoing cases were cited in the case of Randol v. Scott, 110 Cal. 590, to show the extremes to which the courts go in holding to the rule "that forfeitures of estates and restraints upon alienations should not be enforced except when the terms of the conditions are so plain as to be beyond the province of construction," in which case it was held that an adjudication and an assignment in insolvency by one of two lessees, to which the other lessee was not a

party, was not a breach of a covenant by two joint lessees "to not assign this lease or permit any assignment thereof to be made by bankruptcy or otherwise, with out the written consent of the lessor."

On page 595 of the opinion the court, in considering the lease, uses the following language:

> "Appellant must be considered as having dealt with the lessees as tenants in common, and with the knowledge of their rights, powers, and disabilities as such tenants. When, therefore, under these circumstances it was covenanted merely that the 'lessees' should not assign 'the lease,' as an entirety, the meaning of the parties is presumed to be that the lease should not be assigned in the only way in which it could be assigned, namely, by the joint act of the lessees. The lease, therefore, was not assigned within the meaning of the contract. * * * * The covenant does not provide that the lease should be forfeited upon the assignment by one of the tenants in common of his interest. The understanding of the parties as to the covenants in question is illustrated by another clause which provides that the lessor may cancel the lease "in case of the death of the lessees'—not of one of the lessees. A forfeiture can be enforced only when there is "such a breach shown as it was the clear and manifest intention of the parties to provide for."

It has often been held that where a lease is made by several lessors jointly and provides that upon the failure of the lessees to perform any of the covenants, it shall be null and void, if the *lessors* shall so elect,—

that a forfeiture of the leasehold interest for breach of conditions can be declared only by the joint and concurrent action of all of the lessors.

The case of Jameson, *et al,* v. Chanslor-Canfield Midway Oil Company, *et al,* 176 California, page 1, is such a case. Certain provisions of the lease, it was claimed, had not been complied with. Two of the lessors served upon the defendant in the action, which was the lessee, notice of forfeiture and demand for possession of the premises. The two plaintiffs owned a three-fourths interest in the land, and their co-lessor owned a one-fourth interest. The judgment of the court below quieted the title to the three-fourths interest in the land. The court, in considering the effect of the notice, and after citing section 1442 of the Civil Code of the State of California, and holding that the provisions of the lease in relation to forfeiture must be strictly interpreted against the lessors, uses the following language, on page six of the opinion:

> "The event which caused the forfeiture is the failure of the lessees to perform any of the conditions embodied in the lease for a period of thirty days after a notification. By the language of the paragraph, this notification must be given 'by the parties of the first part.' It is only upon the giving of this notice and the failure to perform the conditions mentioned therein that the forfeiture can be declared. This is a condition which must happen in order to give a right to declare the forfeiture. The condition cannot be said to

> have happened upon notification given by some of the parties of the first part, or any number of them less than all. After the notification has been given by all of the parties, a forfeiture may be brought about only 'after said first parties shall so elect.' Here again the action of all of said first parties is necessary to the happening of the condition. It is argued that the only purpose of notification was to give information to the lessee, and that this could be given as well by notice from one of the parties as from all. But the contract measures the rights of the parties in this respect, and, being a contract regarding a forfeiture and to be strictly construed, its requirements must be fully met before the right depending thereon can be complete."

The above case is the reverse of the instant case, but the principle of construction announced there is in point here, and we submit that the contract in question here measures the rights of the landlord to declare a forfeiture, and that forfeiture can only be declared if the "lessees," not one of them or two of them or any number of them less than all, be adjudged bankrupt.

At the time of bankruptcy it is true that all the interest of the third lessee had been assigned to the bankrupt, and that they were the owners of the entire term, but the fact remains that so far as this ownership is concerned, two-thirds of the interest was held by them by reason of their being lessees in the lease, and the other one-third by reason of their being the assignees of the third lessee, and in the provision of this lease

the word "lessees" has reference not to persons upon whom the term might eventually devolve, but to parties to whom the lease was originally made. The language is "said lessees," that is, the parties to whom the lease is made, not any one to whom the term might thereafter be transferred. The appellee could have easily added language providing for such a contingency at the time the lease was drawn, but did not do so, and we submit that under the law applicable to this case, the court should not at this time write into his lease for the purpose of working a forfeiture, something that is not there, when the clear meaning of the language used, without the aid of construction, prevents a forfeiture. Construction and addition is necessary to work a forfeiture, and we submit the court should not aid in any way.

The case of Doe v. Smith, 1 E. C. L., 406, uses the following language on page 408:

> "This is an ejectment founded on a supposed forfeiture of a lease by the lessee having assigned. Rogers was the lessee for twenty-one years; he covenants that he, his executor, or administrator, would not demise, let, set over, or depart with that indenture of lease, or the premises. There is a clause for re-entry on breach of any covenants. Rogers becomes a bankrupt; his assignees take to the lease, and assign it to Palmer, who assigns to Rogers * * * * * There is a subsequent assignment by Rogers. If he had actually assigned it while he remained lessee, no doubt it would have been a breach, and forfeiture,

> but the covenant does not extend to assigns. Rogers stood in the condition of assignee; that interest which he signed over must be considered as the interest which he purchased as assignee, not what he originally had. This, therefore, ought not to be considered as an assignment by the lessee."

The court stated that but for a statute which relieved a lessee assigning his lease from all its obligations he would have held that a forfeiture was created by Rogers' assignment, in view of the fact that he was named in the lease as "lessee," but there is no question of the fact that the transfer by any other "assignee of the lease" would not have been held a transfer by the "lessee" within the meaning of the condition.

In the case of Crawford v. Bugg, 8 Ont. 8, E. leased to P. P., without E.'s consent, assigned to J. B. The lease provided, "and the said lessee for himself, his executors, administrators and assigns, hereby covenants with the said lessor, his heirs and executors, administrators and assigns, in name and form following, that is to say." Then followed the covenant, "not to assign or sublet without leave." Held that the covenant did not include the assignees, as they could not be held to be named; and that the prefatory words of the covenant would have no contrary effect.

> "The cause of action is founded upon a parol contract to pay the rent reserved in a lease from the plaintiff to Edward A. Tudor for a term of three years, from the first day of January, 1859,

at a yearly rent, payable monthly on the first day of each month thereafter. It is stated that the lease was in writing and signed by them, and that it was not to be assigned without the consent of the lessor in writing. This averment does not by its terms extend beyond the immediate parties to the lease, and it cannot by any fair legal intendment be held to include assignees."

Dougherty v. Mathews, 35 Mo. 520.

"If the agreement can be reasonably interpreted so as to avoid the forfeiture, it is our duty to do so."

Quatman v. McCray, 128 Cal. 285, 289.

"A contract is not to be construed to provide a forfeiture unless no other interpretation is reasonably possible."

New Liverpool Salt Co. v. Western Salt Co., 151 Cal. 479, 485.

It will be seen from the foregoing that in the construction of a lease where a forfeiture is involved, that if any possible construction can be made which will prevent a forfeiture, that the courts adopt such construction, and we submit that in the lease in question a forfeiture can only be decreed by going beyond the express provision of the lease. The lease provides that if the "lessees"—not one of them, nor two of them, but all of them—shall be adjudged bankrupt, and the lease makes no provision whatever for a forfeiture in the event the holders of the entire term (other than the lessees named) should be adjudged bankrupt, and

we submit that the court erred in holding that under the circumstances of this case there was a forfeiture of the lease.

Counsel for appellee will undoubtedly contend that by virtue of the acceptance of the assignment of Koll's interest in the lease, which reads—"And in consideration of the foregoing assignment to us, we hereby agree to be bound by and comply with all of the terms and conditions of said lease" [Transcript, page 9]—that the conditions of the lease were in some way changed so that the adjudication of Kimball and Webb meets the condition and works a forfeiture. Such acceptance only binds them to "all the terms and conditions of said lease." One of those conditions is that the "lease," at option of lessor, shall "cease and terminate upon said lessees being by any court adjudged bankrupt." The acceptance does not purport to change in any way such condition, and Kimball and Webb simply assert that they are bound by it, and that in the event "said lessees"—not one of them, or two of them, but *all* of them—be so adjudged bankrupt, the lease may be terminated; consequently, we fail to see how the contention can in any way be pertinent.

The attention of the court is called to the fact that Koll is not released from the obligations of the lease by the assignment of his interest. His liability continues. He is still one of the lessees named in the lease and referred to in the condition, which appellee claims creates a forfeiture. We do not think for a minute that if Koll had been adjudicated bankrupt

and Kimball and Webb were not, that it would ever have occurred to appellee to claim a forfeiture, yet we submit that if the lease can be forfeited on the adjudication in bankruptcy of a less number than all of the lessees, the condition is broken by the adjudication of any one of them. It certainly was not the intention of the parties that any such event should create a forfeiture, and a forfeiture cannot be created in the instant case without changing "said lessees" to read "any of said lessees," a construction opposed to all the authorities.

Points and Authorities on Second Contention.

Appellant contends, however, that even if there was a forfeiture, the same was waived by the lessor. The correspondence in relation to the lease between the Receiver in Bankruptcy, now trustee and appellant herein, and said landlord, the appellee, is set forth on pages 10 to 13 of the transcript. Following those communications, the receiver, Mr. Moore, caused to be handed to Mr. Risley, the appellee, a check for $350.00, on the back of which was the following endorsement, "September, 1921, rental of store at #1141 J. street, Fresno, under lease dated Oct. 4, 1919, $350.00." The lease and store referred to being the lease and premises in question here.

On receipt of this check, Mr. Risley took same to the referee in bankruptcy and told him that he intended to exercise his option under the lease to cancel it, Kimball & Webb having been adjudged bankrupt, and

asked the referee if he would forfeit his right so to do if he accepted the check, considering the endorsement. The referee stated to Mr. Risley that he did not think the receiver intended to take any advantage of him in that particular. Thereafter, Mr. Risley obliterated the words and figures, "lease dated Oct. 4, 1919, $350.00," and endorsed and cashed the check. This transaction was prior to the adjudication in bankruptcy.

On October 1st, 1921, and after the adjudication in bankruptcy, Mr. Moore, having in the meantime been elected trustee in bankruptcy, caused another check for the rent of said premises, signed by himself as trustee, to be delivered to Mr. Risley, on the back of which was the following endorsement, "Oct. rental under lease $350.00." On receipt of this check Mr. Risley obliterated the words and figures, "under lease $350.00," and thereupon cashed said check. This was after the delivery to said trustee of a notice of termination of lease, in which Mr. Risley called attention of the trustee to the fact that said Kimball & Webb had been adjudged bankrupt on August 15th, and that by virtue of the provisions of said lease he exercised his option to terminate the same. [Transcript, page 14.]

There is no question, assuming that the condition had been violated, which we deny, but that Mr. Risley was fully advised of the adjudication of Kimball & Webb.

The unquestioned rule in regard to waiver is stated by the Supreme Court of the state of California, in the

case of McGlynn, *et al.*, v. Moore, *et al.*, 25 Cal., 384, 394, as follows:

> "There can be no doubt that the receipt of rent accruing subsequent to the act which works forfeiture, waived the forfeiture."

Appellant will undoubtedly contend that the question of forfeiture is one of intent, and that the action of Mr. Risley throughout indicates that he had no intention of waiving such forfeiture. Appellant contends that if he did not intend to waive the forfeiture, he should not have accepted the rent as it was tendered; that it was his duty to either accept or reject on the basis on which it was tendered, and having accepted, he accepted as it was tendered, regardless of his protestations.

> "The courts not favoring forfeiture are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture."
>
> "Queen Ins. Co. v. Young, 86 Ala. 424 (quoted by the District Court of Appeals, Second District, Division Two, California, in the case of Jones v. Della Maria, 191 Pac. 943)."

The case of Gulf C. & S. Ry. Co. v. Settegast, 79 Tex. 256, was one in which rent had been paid after a forfeiture and accepted, the lessor protesting all the time that he did not waive any right of forfeiture in so doing, and the court uses the following language:

> "It is well settled that an act of forfeiture is waived by receiving rent which afterwards accrues, provided the landlords have notice of the

act of forfeiture at the time of payment. It will not do for appellees to say that they declined to receive the payment for fear that they would thereby waive their rights against their lessors, and that they were told by the party making the tender that their right would not be waived. It is a case in which actions are more effective than words."

A very instructive case under much stronger facts than are involved in the present case, is that of Croft v. Lumley, 5 El. & Bl. 678, 119 Eng. Rep. (full reprint), 622, 634, where the court uses the following language:

"Certainly Mr. Martelli, always, most resolutely, insisted, both by his letter and by word of mouth, that he would receive the money offered, as compensation for the occupation only, and not as rent under an existing lease, and that he would reserve the lessor's right of re-entry, and, at the moment when he at last took up the money, he repeated the expression that he took it as compensation, not as rent, reserving the right of re-entry. But there is an established maxim of law that, when the money is paid, it is to be applied according to the expressed will of the payer, not of the receiver. If the party to whom the money is offered does not agree to apply it according to the expressed will of the party offering it, he must refuse it, and stand upon the rights which the law gives him. We see no reason why this maxim should not be applied to the transaction in question."

The above case was affirmed in 6 H. L. C. 672, on another proposition. Eight of the nine judges to whom the two propositions involved were referred, held that there was a waiver under the facts of the case.

It is respectfully submitted that the order of the District Court affirming the order of the referee dismissing appellant's petition, should be overruled, and that it should be ordered that the lease in question is not forfeited but remains an asset of said estate and should be sold by the trustee thereof, as such.

W. T. Craig,
Elmore Winkler,
Attorneys for Appellant.
H. R. Archbald,
Of Counsel for Appellant.

No. 3831

In the

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

WM. H. MOORE, JR., as Trustee in Bankruptcy of the Estate of KIMBALL & WEBB, a Partnership composed of Harry J. Kimball, Jr., and Rex Webb, and HARRY J. KIMBALL, JR., *and* REX WEBB, as Individuals, Bankrupts,

Appellant,

vs.

T. E. RISLEY,

Appellee.

BRIEF ON BEHALF OF APPELLEE

FRANK KAUKE,
Attorney for Appellee.

M. S. WEBSTER & SON, FRESNO, CAL.

FILED
MAY 1 - 1922
F. D. MONCKTON,

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Appellee.

BRIEF ON BEHALF OF APPELLEE

The facts of this case are set forth in the Transcript of Record (pp. 7-16), but we submit that the statement in appellant's brief of the issues involved is misleading, and, in part incorrect.

REPLY TO APPELLANT'S FIRST CONTENTION

Originally three persons, Webb, Kimball and Koll, were named as lessees in the written lease, but before any merchandise was moved into the building and business opened, Koll severed his connections with Kimball and Webb, and in writing assigned to them his interest in the lease. At the same time, and in consideration of the transfer, Kimball and Webb in writing agreed to be bound by and comply with all the terms and conditions of the lease, and the lessor (appellee herein), in consideration of said promise and agreement consented to the assignment.

This was not a case of a mere naked assignment of the lease, but was one whereby from that time forward Kimball and Webb held under the lease the same as though they, and they alone, had been the original lessees named in the lease.

The matter of the distinction between an assignment such as made here and a mere naked assignment is fully and clearly discussed in Chase v. Oehlke, 43 Cal. App. R. 435; 185 Pac. 425.

See also Lopizich v. Salter, 31 Cal. App. Dec. 161; 187 Pac. 1075, to the same effect, and wherein a statement made as to counsel for respondent there is quite applicable to counsel for appellant here. "The error of counsel for respondent is due to the fact that he assumes the action to be based upon privity of estate alone arising from the relation of

landlord and tenant rather than upon express covenants."

This is not a case where one of the original lessees (not a bankrupt) is in possession under the lease while another one or more has been adjudicated a bankrupt. Were it so there would be presented a case similar to that where one lessee assigns to another, or assigns to a third party, leaving his co-lessee as one of the parties in possession, and leaving the landlord with the tenant of his own choosing. In the instant case Koll could not, either as against the appellee, nor as against Kimball & Webb, resume or take over the possession of the premises under the lease. For value received he assigned all his interest in the lease, and in consideration thereof, Kimball and Webb agreed to be bound by all the terms and conditions of the lease, and in consideration of the promise on their part, the appellee consented to the assignment. It is therefore evident that it was the intention of all of the parties that thenceforth as to all the terms and conditions of the lease Kimball & Webb, and they alone, were the "lessees" of the lease, for all purposes.

In the matter of Lindy-Friedman Clothing Co., Inc., Bankrupt, 275 Fed. Rep. 453 the District Court of the Northern District of Alabama, Southern Division, had occasion to review an order of the referee relative to a lease wherein there was a clause similar to that contained in the lease in question in the case

at bar. In that case the referee's decision was in favor of the trustee, and the order was to the effect that the trustee was entitled to the possession of the premises and the ownership of the leasehold, and the lessors were enjoined from interfering with the possession of the trustee and his assigns.

The lease contained the following paragraph:

> "The lessee agrees * * * not to assign this lease, nor underlease or let said premises, or any part or interest therein, without the written consent of the lessor, hereon indorsed * * If an execution or other process be levied upon the interest of the lessee in this lease, or if a petition in bankruptcy be filed by or against the lessee in any Court of competent jurisdiction, the lessor shall have the right, at his option, to re-enter said premises and annul this lease."

It also contained the following:

> "It is contemplated by the lessees herein to organize a corporation with not less than $20,000.00 paid-up capital, and it is agreed that when said corporation is organized the lessees shall have the right to transfer, assign this lease and sublet the property described to such corporation. The form to be used in the transfer and subletting shall be the same as the form hereto attached marked 'Exhibit A'."

Exhibit A was as follows:

> "For value received the lease contract hereto

attached, by and between as lessor, and as lessee, is hereby transferred, assigned and conveyed by to and the property described in said lease contract is hereby sublet by to, and in consideration thereof the said hereby agrees to pay the rent due or to become due under the terms of said contract to, and further assumes all other obligations of the original lessee to the original lessor.

"The undersigned hereby consents to the above transfer, assignment and subletting, but in giving his consent does not in any wise change or modify said contract or release the original lessee from any obligation to the original lessor."

The District Court said:

"Throughout the lease the landlords are called 'lessors,' while the tenants are called 'lessees'. Friedman and Lindy occupied the premises for a brief period, and then, as contemplated by the provision quoted from the lease, organized the corporation, which entered and occupied the premises for the period from about September, 1919, to June, 1920, and then became bankrupt, and its estate is now being administered by this Court. John S. Coxe was appointed receiver, and subsequently, in the latter part of June, 1920, made trustee of the estate.

"On June 30, and July 5, 1920, the lessors, S. L. Tyson and N. W. Tyson, gave notice in

writing to the original lessees, the subtenants, the bankrupt and the trustee, that they elected to exercise their option to re-enter the said premises, and made demand for the surrender thereof, assigning no particular reason. On May 18, 1921, the trustee in bankruptcy filed his petition, setting out substantially the foregoing facts, and praying for an order to the effect that the trustee is entitled to possession and ownership of the leased premises, and to have the lease performed by the lessors in favor of the trustee for its unexpired term. Upon the hearing of this petition, the facts were substantially without dispute.

"Undoubtedly, the landlords had fundamental rights, which if not granted away by them, cannot now be taken from them by a Court; and it is clear to my mind that the intention was to preserve and not to surrender certain of these rights.

"It is a sound proposition and applicable to this lease that, it being for a term of years, restrictions against assignments without the consent of the lessor are valid, for various reasons, among them that a lessor has the right to exercise his judgment with respect to the persons to whom he trusts the management or custody of his premises. Naturally he does not want undesirable tenants, those who may use his property for unlawful purposes, or those whom he may consider financially irresponsible. This doctrine, I think, is upheld by the cases cited in 16 R. C. L. Sec. 326-645."

"The lessors urge that the lease contract has been terminated according to its express provisions by the bankruptcy of the Lindy-Friedman Clothing Company, Inc. On the other hand, the trustee insists that the term 'lessee' as used in the lease must be strictly construed, and, so construed, must be held to refer to the original lessees, Lindy and Friedman, only. I think such construction too narrow, too technical, because it does not accord with the contemplation of the parties to the lease. It is not to be doubted that the organization of the corporation, now the bankrupt, was contemplated, for the lease itself shows such to be the fact; and I think it is not unfair or unreasonable to say that the intention of both the parties was that the corporation, when organized, should step into the shoes of the original lessees, Lindy and Friedman, and become as fully bound in every respect as Lindy and Friedman, were bound. It is not disputable that, if the assignment of the lease had been in the manner and form provided for in the lease, the corporation, the bankrupt, would have been entitled to all the rights and benefits conferred upon the 'lessee' named in the lease, and correspondingly would have been subject to all of the obligations imposed upon the 'lessee', Lindy and Friedman. Bearing in mind the purposes and objects sought to be accomplished by this provision in the lease, 'if a petition in bankruptcy be filed by or against the lessee,' etc., it seems clear to me that for all practical purposes the corporation would be considered the lessee—taking the place of Lindy

and Friedman under the contract with all the privileges granted, and together with the restrictions, reservations, and conditions stipulated in the lease instrument. While the lease was not formally assigned to the corporation, the trustee claims that the assignment was verbal, and that the original lessees simply admitted the corporation into possession of the leased premises, and that thereafter the corporation paid the monthly rental. If the lease is to be treated as having been formally assigned to the company, now the bankrupt, then, assuredly, the bankruptcy of the company operated as a forfeiture of the lease, and the landlords had the option to re-enter their premises because the contract in express terms provided that the bankruptcy of the lessee should work such forfeiture. The express provision is that—

'If a petition in bankruptcy be filed by or against the lessee in any Court of competent jurisdiction, the lessor shall have the right at his option to re-enter said premises and annul this lease.' "

Appellant seeks the shield and protection of the rule that conditions in a lease calling for a forfeiture are to be strictly construed against the lessor. That such a rule is applicable to certain kinds of conditions, appellee does not deny. But we do not concede that it is in any way applicable to the clause in the lease under consideration. This cause for forfeiture is not a harsh or oppressive one. On the

other hand it is a common, reasonable and just one, and accordingly calls for a reasonable and fair interpretation.

The case of Empress Theatre Company, appellant, vs. W. A. Horton, Trustee in Bankruptcy, appellee, 46 American Bankruptcy Reports, p. 80, is a case where the lease, among other things, contained the clause:

> "The bankruptcy or insolvency of the party of the second part, or other tenant who may go into possession of the premises, with the written consent of the party of the first part, shall at the option of the party of the first part, work immediate forfeit of the lease, and all interest of the party of the second part therein and thereunder."

There, as here, the trustee in bankruptcy desired to retain the lease and dispose of same for the benefit of the creditors. The District Court rendered its decision in favor of the trustee, and the appeal was taken by the lessor. The Circuit Court of the Eighth Circuit reversed the judgment of the District Court, and among other things said (p. 86):

> "Nor was there anything in the condition and covenants of this lease evil in itself or prohibited by law or contrary to the public policy of state or nation. The condition and covenants were not novel but common provisions in leases. Conditions and covenants in leases of the same

character have been repeatedly considered and generally, nay almost universally, sustained and enforced both by courts of equity and courts of law," citing Kann v. King, 204 U. S. 43, and numerous other cases.

Also, pp. 91-92:

"The record presents full, clear and strict proof of the right of the respondent, as a matter of law to the termination of the term of the lease and the lease itself, and to the return of the leased premises to it upon the service of its notice of election to enforce that right, and in such a case equity ought to and it does follow the law and enforce the right. The decree and orders below must, therefore, be reversed."

In the case of Lindeke v. Associates Realty Co., 146 Fed. 630, 1906 (C. C. A.) Minn., the question of the proper construction of similar forfeiture clauses in leases was considered as follows:

"The final contention of appellants' counsel is that the courts are adverse to forfeitures and that they are the abhorrence of courts of equity. Equity, however, still more abhors a failure of justice, as nature does a vacuum. In Brewster v. Lanyon Zinc Company (C. C. A.) 140 Fed. 801, 819, the conditions under which a court of equity will assist in the enforcement of a forfeiture under lease contracts, are extensively discussed by Judge Van Devanter. His conclu-

sion is aptly expressed in the following paragraph:

> 'The better rule is that the rule is not absolute or inflexible, any more than is every forfeiture harsh and oppressive; that its influence and operation do not extend beyond the reasons which underly it; and that in cases, otherwise properly cognizable in equity, there is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice, and morality than to withhold equitable relief. As said by Story, Eq. Jur. par. 439: "The beautiful character and pervading excellence, if one may so say, of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes." ' "

In the case of Louis K. Ligget Co. v. Wilson, 113 N. E. (Mass.) 184, the propriety of a clause permitting of a forfeiture in the event of bankruptcy of the lessee is clearly set forth as follows:

> "Where a lessee becomes bankrupt (or otherwise unable to meet his obligations) unless some clause providing for the contingency is inserted in the lease the lessee continues to be the owner of the term created by the lease and all that the lessor can get is such dividend on the amount of the rent as the bankrupt lessee can pay. To protect the landlord against that contingency it is not uncommon to insert in leases a clause

providing (1) that the leasehold estate shall be conditioned upon the lessee not becoming bankrupt (or otherwise unable to pay his debts) and (2) that if the lessee does become bankrupt (or otherwise unable to pay his debts) the lessor may enter and end the leasehold estate for condition broken. If the contingency arises and the lessor does enter and end the leasehold estate, the loss to the lessor mentioned above is avoided."

And likewise in the case of Galbraith v. Wood, 144 N. W. (Minn.) 945, the court said:

"The default clause provides that the lessors may, at their election, declare the term ended and re-enter the premises. It gives but a single remedy. Of course, defendants were not obliged to terminate the lease, but they had the clear right to do so, and certainly were not bound to retain a bankrupt tenant, with the probability of non-payment of the rent, and a sale of the leasehold by the bankrupt estate."

REPLY TO APPELLANT'S SECOND CONTENTION.

Was there a waiver of the forfeiture by the appellee? It is the appellee's (lessor's) position that there was no waiver. The correspondence between the trustee and the lessor (Transcript of Record, pp. 10-13) shows an unequivocal intention and de-

claration on the part of the appellee, as well as due and sufficient notice to the trustee, that the lease would be terminated when the lessees were adjudicated bankrupt.

> "I will consider the lease terminated at the time the court decides that Kimball and Webb to be bankrupt." (Transcript of Record p. 12).

It is idle for the trustee to now assert or urge that he has been, in any manner whatsoever, misled or prejudiced by any act or word or deed on the part of the lessor. Moreover, the trustee had no right or authority after receiving the said notice from the appellee that the lease was terminated, to insert upon the checks thereafter given in payment of the monthly rental the words, "under lease date of October 4th, 1919, $340.00." In fact, such act on the part of the trustee was not merely the violation of a right; on its face it would appear to be a deliberate and purposeful scheme on the part of the trustee to catch the appellee in a trap, and virtually to defraud him. In the transaction the trustee was an officer of the District Court. Surely the District Court of the United States does not expect its ministerial officers to resort to trick and device, nor does it approve or uphold an advantage sought to be obtained by such methods. The obliteration of those words on the back of the checks by the appellee was not a serious or important irregularity on his part in view of the fact that the checks were countersigned by

the Referee and that the appellee consulted that officer concerning same, and acted, if not by the advice or direction of the Referee at least with his assurance and approval. Moreover that act clearly evidenced the definite intention on the part of the appellee to no longer recognize the lease as having any further force or effect, and signified again that he, the said lessor, was merely accepting payment from the trustee of a monthly rental, independent of the lease, for the reasonable use and occupation of the premises during the period of time that was necessary in winding up the affairs of the bankrupts, and which compensation he had a right to receive.

The law recognizes the right of a landlord to receive compensation, independent of the lease, for the occupation of the premises under circumstances precisely similar to the instant case. In the case of Myers vs. Herskowitz, 33 Cal. App. R. 581, 584, this matter is discussed as follows:

> "The tenant having succeeded in retaining possession of the premises during the pendency of the action, plaintiff was entitled to compensation therefor, and after the benefit had been received by the defendant the plaintiff might reasonably accept such compensation, to which he was entitled, without being held to have waived the right of action which he was then prosecuting. In Ramish v. Workman, ante, p. 19, (164 Pac. 27), it was held that the landlord was entitled to recover rent for a period which

included the time between the entry of a judgment for possession and the date of actual ejectment of the tenant. 'So long as defendants continued to occupy the premises pending the final determination of the action for unlawful detainer, the lease constituted the measure of their liability for such time as they remained in possession.' Under these circumstances, we perceive no reason why plaintiff's acceptance of compensation to which he was clearly entitled should force upon him an implied waiver which he did not intend and which evidently the defendant knew that he did not intend. 'Neither will the receipt of rent after a landlord has actually commenced his action of ejectment for the forfeiture, or as compensation for the occupation, the landlord reserving the right to reenter, amount to a waiver.' (Taylor on Landlord and Tenant, 9th ed., sec. 497.)"

And in the case of In. re. Crawford Plummer Co., 253 Fed. 76, the Court said:

"A trustee or receiver has the right to use the premises occupied by the bankrupt for a reasonable period, sufficient to enable him to dispose of the bankrupt's property without unnecessary loss. * * This court has several times stopped landlords from prematurely ousting receivers or trustees. Such use of real estate is not an adoption of the lease to the bankrupt. The liquidating officers are to pay therefor reasonable compensation for the use and

> occupancy of the premises * * * It has generally been thought that the rent reserved in a lease to the banrupt was, under ordinary conditions, the fair measure of what the use and occupancy by receivers or trustees was fairly worth, * * *"

The appellee (lessor) concedes the law generally to be as stated in appellant's brief, to wit, that the receipt of rent accruing after the occurrence of causes of forfeiture bars the right of the lessor to enter for condition broken. These are, however, exceptions to the rule, which are as certain and well defined as the rule itself, among which it may be stated that there is no waiver if there is no intention to waive the forfeiture and the adverse party was not misled or prejudiced by the act of the lessor.

The essential elements of waiver are clearly set forth in the case of Myers vs. Herskowitz, 33 Cal. App. R. 581, 584, as follows:

> "* * * the question of waiver is one of intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. To establish such waiver the evidence must indicate a meeting of minds and the intentional forbearance to enforce a right. (Alden v. Mayfield, 164 Cal. 6, at p. 11, (27 Pac. 45). Where the general course of dealing between parties has led one of them to believe that a strict compliance with the terms of a condition binding him will not be required, the other party may be

estopped from claiming the forfeiture. What we have to determine, therefore, is whether the plaintiff manifested an intention to waive his objections to the conduct of the defendant, and whether in so doing he misled the defendant to his injury by causing defendant to believe these infractions of the covenant would be condoned."

In 40 Cyc. 261, the subject of waiver is discussed at length as follows:

"The quesion of waiver is mainly a question of intention, which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be intentional. There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other and is estopped thereby. Since intent is an operation of the mind it should be proven and found as a fact, and is rarely to be inferred as a matter of law. An intention to make the waiver claimed should clearly be made to appear by the evidence; and the best evidence of intention is to be found in the language used by the parties. The true inquiry is what was said or written, and whether what was said indicated the alleged intention. The secret understanding or intent of the parties is immaterial on the question of waiver. The intention need not necessarily be proved by express declarations, but may be shown by the acts and conduct of the parties, from which an

intention to waive may be reasonably inferred, or even by non-action on their part."

In the case of Gary Realty Co. vs. Kelley, 214 S. W. (Mo.) 92, the court had under consideration a case somewhat similar to the case at bar. There, as here, the lessor would terminate the lease by reason of the bankruptcy of the lessees. The trustee continued to make the payments of the monthly rentals, and subsequently asserted that the lessor had thereby waived the right to forfeit the lease. In repudiating this argument the court said:

"Here, immediately after the occurrence of the fact constituting a breach of condition, notice of plaintiff's election to declare a forfeiture therefor was given. And plaintiff has throughout and up to now continuously insisted on this forfeiture. Thereafter, an agreement for a continuance in possession of the receiver of the lessee was made with the latter. But such continuation in possession was not to be under the terms of the lease now alleged to be forfeited, but was pursuant to a new arrangement entirely. No acquiescence in the breach ever at any time occurred on plaintiff's part. Nor is there in the record any acquiescence in receiver's alleged possession under the lease. The lease was throughout by plaintiff declared and deemed to be forfeited, abrogated, and at an end, and this condition of forfeiture was agreed to and acquiesced in by the lessee's receiver, who fully understood all the facts and the entire situation

> and who thereafter was treated as, and paid rent till given notice to quit, as a tenant by the month. No one ought to be deemed to waive a right when every act he does and every word he utters constitutes a denial of a waiver thereof, and a denial of any intention to waive it. Especially when this attitude is fully disclosed to, and known at all times by, the adverse party. We conclude that there was no waiver of the forfeiture disclosed by the facts in this case."

The case of Gulf C. and S. F. Ry. Co. vs. Settegast, 15 S. W. (Tex.) 228 relied upon by appellant is entirely distinguishable from the instant case. In that case, the lessors brought an action to cancel a lease which had been made by them with the Texas Western Railway Company, and which was thereafter assigned by the latter to the Gulf, Colorado and Santa Fe Railway Company. The lessors declared that this assignment forfeited the lease because written consent, as required by statute, had not been granted. The defendants (original lessees and assignees) set up waiver of the right of forfeiture because the lessors accepted rent from the assignee, Santa Fe Company. The court said (italics ours):

> "Having accepted money from the appellant, *which was due only in case the contract continued in force after the assignment*, they are estopped to deny the continued existence of the lease, and to say that they did not know the appellant in the transaction."

The quotation in appellant's brief from the case of Croft vs. Lumley, 119 Eng. Rep. 622, 634, would have been a more accurate statement of the law, had the remaining portion of the paragraph from which it was taken been inserted. That portion of the paragraph is as follows:

> "Mr. Martelli might have refused to receive the money offered as arrear of rent; and then the plaintiff might have proceeded for the forfeiture; but Mr. Barnes, who offered the money, *repeatedly told him* that, if the money was received, it was to be received and applied *in payment of the arrear of rent* due by the lease; and, under these circumstances, whatever words he might utter, when, acting by the authority of the plaintiff, he took up the money and carried it away, in point of law he received it as rent, thereby waiving the forfeiture and confirming the lease."

The appellant quotes from Jones v. Della Maria, 32 Cal. App. Dec. 554; 191 Pac. 943, but an examination of that case shows that the court recognizes the clear line of distinction which is overlooked by appellant. Thus in the decision (the italics being ours) we find the following:

> "Waiver is the *intentional* relinquishment of a known right or such conduct as *warrants an inference of the relinquishment* of such right—an *election* to forego some advantage he could have taken or insisted upon * * * * *

> Having elected to treat his tenant as no longer entitled to possession or to any right under the lease, the landlord's course must be consistent with this claim in the further progress of the proceedings that he has instituted. And if thereafter he accept rent accruing subsequently to the demand for possession or accruing subsequently to the commencement of the action, and accept it as rent *eo nomine* that is, *as payment under the original lease contract*— he affirms that the lease is still in existence, and thereby waives the forfeiture that he has elected to enforce.
>
> * * * A landlord who thus recognizes a lease as a *subsisting, operative contract* should not be permitted to insist upon a past forfeiture."

But in the instant case instead of there being an intentional relinquishment of the right to declare a forfeiture, there was the positive assertion that the lessee "will consider the lease terminated at the time the court decides Kimball and Webb to be bankrupt." Instead of conduct such as warrants an inference of the relinquishment of the right, we find that the appellee went to the Referee, one of the officers of the court, who was one of the signers of the check, and told him that he, appellee, intended to exercise his option under the lease to cancel it," and was by that officer led to believe that he would not forfeit his right by cashing the check; and at all times there-

after the appellee made clear and plain to the trustee that he, the appellee, did not relinquish or waive his right to consider the lease terminated; and instead of recognizing the lease *as a subsisting and operative contract*, he from the beginning acted and declared to the contrary.

The appellee therefore respectfully submits that the order of the District Court affirming the order of the Referee should by this Court be affirmed.

FRANK KAUKE,
Attorney for Appellee.

No. 3831.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

21

Wm. H. Moore, Jr., as Trustee in Bankruptcy of the Estate of Kimball & Webb, a Partnership Composed of H. J. Kimball, Jr., and Rex Webb, and H. J. Kimball, Jr., and Rex Webb as Individuals, Bankrupts,

Appellant,

vs.

T. E. Risley,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANT.

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No. 3831.

IN THE

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Wm. H. Moore, Jr., as Trustee in Bankruptcy of the Estate of Kimball & Webb, a Partnership Composed of H. J. Kimball, Jr., and Rex Webb, and H. J. Kimball, Jr., and Rex Webb as Individuals, Bankrupts,

Appellant,

vs.

T. E. Risley,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANT.

At the oral argument of this case the point was urged by attorneys for Appellant that inasmuch as the lease in question in this litigation provided that said lease "Shall, at the option of the lessor cease and terminate upon *said lessees* being by any court adjudged bankrupt," and inasmuch as the lessees in said lease named were Rex Webb, H. J. Kimball, Jr., and J. H. Koll and inasmuch as only Webb and Kimball have been adjudged bankrupt, that the condition of forfeiture provided by said lease has never risen.

"The lessee has both a privity of contract and a privity of estate; and though he assigns and thereby destroys the privity of estate, yet the privity of contract continues and he is liable in covenant notwithstanding the assignment."

Wood on Landlord and Tenant, Sec. 304.

In the case of Wilson v. Gerhardt, 9 Colo. 585, the lease was made to Charles Gerhardt and A. J. Voight as Gerhardt & Voight. Gerhardt withdrew from the firm and assigned the lease to Voight, which assignment was consented to by Wilson, the lessor. Held that

"a lessee who assigns his lease does not thereby discharge himself of his obligation under it. He remains liable upon his express covenants to pay rent in an action by the lessor, even if the lessor has accepted the assignee as his tenant and collected rent from him."

Wilson v. Gerhardt, 9 Colo. 585.

"A lessee with the written consent of his lessor assigned his lease, the assignee covenanting to assume the rent and to perform all of the covenants his assignor had undertaken to perform. The lessor accepted rent of the assignee. Held that the original lessee was still liable to his lessor upon his express covenant to pay rent."

Ranger v. Bacon, 3 Misc. (N. Y.) 95.

"Doubtless it is competent for a lessor to enter into such stipulations with an assignee as to accept him as sole tenant and to absolve the original

lessee from his contract. But an intent to create a new contract and to annul the lease as against the original lessee must be clearly shown."

Way v. Reed, 6 Allen (Mass.) 364.

For the appellee to sustain the position he has taken, it would be necessary that a novation should be established. Our Civil Code provides:

"Novation is made: * * * 2. By the substitution of a new debtor in place of the old one, with intent to release the latter."

Cal. C. C. Sec. 1531.

"The burden of establishing a novation is upon the party who asserts its existence."

Brown v. Coffee, 17 Cal. App. 381, 384.

See also

Carpy v. Dowdell, 131 Cal. 495, 497.

See also

Haubert v. Mausshardt, 89 Cal. 433, 436.

"The intent of the creditor to release the obligation of the original debtor is necessary to the creation of the contract of novation; and if it be lacking, as apparently it was in the present case, novation cannot be justly claimed."

Martin & Co., v. Brosnan, 18 Cal. App. 477, 480.

Appellee may claim that the record does not show that in the lease under discussion there was an agree-

ment upon the part of the lessees to pay rental. The language of the lease is as follows:

"And the said parties of the second part do hereby promise and agree to pay to the said party of the first part the said monthly rent herein reserved, in the manner specified."

Inasmuch as no assumption can be made in aid of a forfeiture and inasmuch as the burden is upon the person claiming the forfeiture to establish it, we think that this court will assume that the lease contained a provision of this kind and will not assume that the lease contained no such provision. Attention is called to the fact that the court below determined the matter upon the stipulated facts contained in the record on appeal.

It is respectfully submitted that the condition providing for the forfeiture of this lease has never arisen and that the order of the District Court and of the referee should be reversed.

W. T. Craig,
Elmore Winkler,
Attorneys for Appellant.
H. R. Archbald,
Of Counsel for Appellant.

No. 3831

In the

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

WM. H. MOORE, JR., as Trustee in Bankruptcy of the Estate of KIMBALL & WEBB, a Partnership composed of H. J. Kimball, Jr., and Rex Webb, and H. J. KIMBALL, JR., and REX WEBB, as Individuals, Bankrupts,

Appellant,

vs.

T. E. RISLEY,

Appellee.

Reply of Appellee to Appellant's Supplemental Brief

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No. 3831

In the

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

WM. H. MOORE, JR., as Trustee in Bankruptcy of the Estate of KIMBALL & WEBB, a Partnership composed of H. J. Kimball, Jr., and Rex Webb, and H. J. KIMBALL, JR., and REX WEBB, as Individuals, Bankrupts,

Appellant,

vs.

T. E. RISLEY,

Appellee.

Reply of Appellee to Appellant's Supplemental Brief

Appellee has never disputed, and does not now dispute, the elementary principles of law as set forth in the numerous decisions cited by appellant in his supplemental brief. It is, however, the contention of the appellee that under all the facts and circumstances in this matter, it satisfactorily appears that

it was the intention of all the parties to the lease that J. H. Koll was to be eliminated, and was eliminated, as a *lessee* and was not thereafter to be considered as such. It is not necessary at this time to determine whether there was necessarily or technically a novation. This court is merely determining the operation and effect of the clause in the lease under consideration permitting a termination thereof in the event of the bankruptcy of the lessees.

The Supreme Court of California in the case of Chase v. Oehlke, 30 Cal. App. Dec. 79, 80, (185 Pac. 425) discusses with lucidity the status of assignees of a lease who (as in the instant case) expressly covenant and agree to pay the rental reserved in the lease, as follows:

> "Appellants having upon sufficient consideration assumed and agreed to pay the rent, their obligation is identical with that of the original lessee upon his express covenants so to do, and when they, as alleged and found, repudiated the lease and abandoned the premises the plaintiff was entitled to stand upon the terms of the contract made with the lessee and his assigns for the lessor's benefit and sue thereon to recover the rent which they had agreed to pay, in the same manner and to the same extent *as though they had been the original obligors under the terms of the lease.*" (Italics ours.)

Again in the case of Realty and Rebuilding Company v. Rea, 184 Cal. Rep. 565, 569, the court says:

> "Where, however, the assignee expressly

agrees in writing to be bound by the terms of the lease, there arises, as distinguished from any obligation resulting from mere occupancy, a new and different obligation which is not dependent upon occupancy of the premises, but is based upon privity of contract. By virtue of this agreement, a contractual relation is established, whereby the assignee becomes liable upon and entitled to the benefit of all of the covenants of the lease as such."

It will further be observed that in the instant case, as was stated by counsel for appellee in the oral argument of this matter, it was not necessary for Koll to obtain the permission of the lessor to the assignment of his interest in the lease, inasmuch as one lessee may assign to a co-lessee without violating provisions of assignment as such provisions ordinarily are contained in such instruments. Kimball and Webb were already bound by the terms of the lease and it was not necessary for them to accept the assignment and to assume the terms of the lease. It is therefore evident that it was the intention of all the parties that Koll should be eliminated, and that Kimball and Webb should thenceforth be the lessees and all of the lessees. It was for this reason that the respective parties signed the statements appended to the lease at that time. No other plausible motive or reason can be deduced from what they did.

Concede for the purpose of the argument that the lessor, notwithstanding the intention of the parties at the time as above mentioned, might have held Koll

to his personal obligation for the payment of the rental under the lease, nevertheless from the time of that assignment he stepped aside in favor of Kimball and Webb as the only *lessees*. Thenceforth he became and was merely a *surety* for the performance of the obligations by Kimball and Webb as *principals*. The Supreme Court of California has frequently recognized this surety relationship as existing between the assignor and the assignee of a lease, even in cases where there is a mere naked assignment:

Brosnan v. Kramer, 135 Cal. 36, 39:

> "The effect of the assignment is to make the lessee a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal bound, whilst he is assignee, to pay the rent and perform the covenants. (Wood on Landlord and Tenant, sec. 350.)

Dietz v. Kucks, 45 Pac. (Cal.) 832, 833; (5 Cal. Unrep. 406):

> "In the absence of some agreement to the contrary, the tenant who, as in this instance, assigns his whole term, remains liable as a surety. The assignee becomes liable directly to the lessor upon all the covenants of the lease which run with the land, and his assignor remains his surety to the lessor for the performance of such covenants."

Cross v. Thiele, 34 Cal. App. Dec. 807, 808; (197 Pac. 974):

> "It is well settled, certainly, that where a

lease is assigned the assignor becomes a surety for the assignee under the obligation of the latter to pay the rent to the lessor."

As has also already been stated, Koll having assigned all his interest in the lease could not take possession of the lease property, notwithstanding the bankruptcy or default on the part of Kimball and Webb, and although Koll was at one time one of the lessees, in no way could he resume his position as such lessee. If the trustee in bankruptcy is permitted to sell the lease the purchaser thereof will be a party found by the trustee and not chosen or selected by the lessor. The purpose of such clause in the lease is to enable the lessor to have, in whole or in part, tenants of his own choosing.

The logic of appellant's position in this matter is in direct opposition to the intention of the parties. The reasoning of the court in the matter of Lindy-Friedman Clothing Co., Inc., Bankrupt, 275 Fed. Rep. 453 (Appellee's brief, pp. 5-10) is directly applicable to the case at bar, and is conclusive as to the issue here involved.

FRANK KAUKE,
Attorney for Appellee.

No. 3832

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOHN D. SPRECKELS, as Special Administrator of the Estate of JOHN D. SPRECKELS, Jr., Deceased,

Plaintiff in Error,

vs.

EDITH H. WAKEFIELD,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Defendant.

In the District Court of the United States for the Southern District of the Northern District of California, Second Division.

(No. 16077.)

EDITH H. WAKEFIELD,

Plaintiff,

vs.

JOHN D. SPRECKELS, Jr.,

Defendant.

Complaint on Contract.

Comes now the plaintiff above named and complains of defendant above named and for cause of action alleges:

I.

That plaintiff is now and has been since on or about the first day of September, 1916, a citizen

of the State of New York and resident of the State and City of New York.

II.

That defendant has been at all the times herein mentioned and now is a citizen and resident of the State of California, and of the City and County of San Francisco, in the Northern District thereof.

III.

Plaintiff is and for more than one year last past has been the wife of Franklin W. Wakefield; that prior to her said marriage to said Franklin W. Wakefield, her name was Edith Marie Spreckels;

IV.

That on or about the 1st day of December, 1913, at the City and County of San Francisco, State of California, plaintiff and defendant made and entered into a certain agreement in writing in the words and figures as following, to wit:

"THIS AGREEMENT, made and entered into this first day of December, 1913, by and between John D. Spreckels, Jr., the [1*] party of the first part, and Edith Marie Spreckels, his wife, the party of the second part, both of the City and County of San Francisco, State of California,

WITNESSETH:

That whereas, the party of the second part is about to commence a suit for divorce against the party of the second part and has employed Mr. Joseph T. O'Connor as her counsel for that purpose, and the party of the first part has employed

*Page-number appearing at foot of page of original certified Transcript of Record.

Mr. Samuel M. Shortridge to represent him in said suit; and,

Whereas, said parties desire to avoid the expense of litigation over any and all questions as to their respective property rights, including the right of said second party to temporary and permanent alimony, and also desire to avoid any controversy over the care, custody and maintenance of the minor children of said parties; and,

Whereas, said parties being fully and independently advised by their respective counsel and each being fully informed as to his and her rights, duties and obligations growing out of their marriage relation, have come to an agreement as to each and all of said matters;

NOW, THEREFORE, in consideration of the mutual covenants each to the other running, and of other good and valuable consideration each to the other moving, have agreed and do hereby agree as follows, to wit:

1. That upon the due making and entry of an interlocutory decree of divorce in favor of the said second party the said first party will pay unto the said second party the sum of Three Hundred and Fifty ($350.00) Dollars, monthly, in advance, commencing with the date of the entry of said interlocutory decree, for the period of one year thereafter; that upon the due making and entry of a final decree of divorce in favor of the said second party, said first party will pay unto the said second party, monthly, in [2] advance, the sum of Three Hundred and

Fifty ($350.00) Dollars during the remaining period of her natural life.

2. That the said second party agrees to accept said several sums of Three Hundred and Fifty ($350.00) Dollars, monthly in advance, as and for and in full of her right or claim to temporary and permanent alimony, maintenance and support from the said first party.

3. That the said second party hereby releases, quitclaims and grants unto the said first party all her right, title and interest, past, present and future, in and to any and all community property of the said parties hereto and in and to any and all separate property of the said first party.

4. That the said parties hereto have settled and do hereby forever settle all their property rights, including the right of the said second party to alimony, support and maintenance from the said first party, and that whatever property the said first party now has, be the same community or separate property, and whatever property he may hereafter acquire shall henceforth be considered as and be his separate property, and that whatever proportion the said second party now has or may hereafter acquire shall henceforth be considered as and be her separate property.

5. That whatever deeds or written instruments shall be necessary to effectuate the ends aforesaid and to quiet title to any property now owned or hereafter to be acquired by either of said parties shall be executed by the said parties hereto, each to the other, respectively, on demand.

6. That the care and custody of the minor children of said parties be and remain with and in the said second party, their mother, and that while said children are being supported and maintained by the said second party, the said first party will [3] pay to the said second party, for the support and maintenance of said children, the sum of Three Hundred ($300.00) Dollars per month, in advance, that is to say, One Hundred ($100.00) Dollars per month for each of said children supported and maintained by said second party; that the said first party shall have the right to visit said children, and have said children visit with him, at any and all times convenient to him and them; that none of said children shall be taken out of the State of California without the previous written consent and approval of both of the said parties hereto.

7. That the said second party shall have the possession and use of the household furniture and effects now in the present home of the said parties hereto, situated at number 1232 Washington Street, in said city and county.

8. That the said second party represents and agrees that she has incurred bills amounting to the sum of $1500.00, which are all the bills incurred by said second party and remaining unpaid, and which said first party agrees to pay.

And said second party agrees to save said first party harmless from the payment of any other bills now existing or hereafter to exist by her incurring, and that if any should come up and be paid by said first party, that he may deduct the same from any

alimony to be paid to said second party under this agreement, or any decree of court.

9. That the provisions of this agreement shall not be modified or abrogated by any interlocutory decree or final decree of divorce in favor of the said second party which may be hereafter made and entered.

IN WITNESS WHEREOF, the said parties have each hereunto set his and her hand and seal, in duplicate, on this [4] the day and year first above written.

JOHN D. SPRECKELS, Jr. (Seal)
EDITH MARIE SPRECKELS. (Seal)

Signed, sealed and delivered on the 1st day of December, 1913, in the presence of

SAMUEL M. SHORTRIDGE.
JOS. T. O'CONNOR.

State of California,
City and County of San Francisco,—ss.

On this 1st day of December, in the year one thousand nine hundred and thirteen, before me, Charles Francee, a notary public, in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, appeared John D. Spreckels, Jr., and Edith Marie Spreckels, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, State of California,

the day and year in this certificate first above written.

CHARLES FRANCEE,

Notary Public in and for the City and County of San Francisco, State of California. [5]

That thereafter said Edith Marie Spreckels filed an action for a divorce from said John D. Spreckels, Jr.; that thereafter the said action came on for trial in the Superior Court of the State of California, in and for the City and County of San Francisco, and on the 24th day of August, 1914, an interlocutory decree of divorce was made, signed, filed and entered therein in favor of the said Edith Marie Spreckels; that thereafter and on August 25, 1915, a final decree of divorce was duly made and entered in said action in favor of said Edith Marie Spreckels; that upon the entry of said interlocutory decree of divorce defendant commenced to and thereafter continued to make the monthly payments to plaintiff of Three Hundred Fifty Dollars ($350.00) under and by virtue of the said written agreement hereinabove set forth up to on or about April 1st, 1915; that since the said first day of April, 1915, the defendant has made no payments whatever on account of said monthly payments of Three Hundred Fifty Dollars ($350.00).

VI.

That the minor children of the parties hereto were and are Marie R. Spreckels, Adolph B. Spreckels, and John D. Spreckels III, and the said children are the minor children referred to in said written agreement above set forth.

VII.

That the said Adolph B. Spreckels was supported and maintained by the plaintiff from the first day of February, 1916, to the first day of September, 1916; that plaintiff has not paid anything for the support and maintenance of said Adolph B. Spreckels during said period.

VIII.

That since the entry of said interlocutory decree of divorce plaintiff has paid out and expended for and on behalf [6] of said Marie R. Spreckels an amount in excess of the sum of One Thousand Dollars for her support and maintenance, no part of which has been paid.

WHEREFORE, plaintiff demands judgment against defendant for the sum of Ten Thousand Three Hundred Dollars ($10,300.00), together with interest on all said deferred payments from the time the same become due, at the rate of seven per cent per annum; cost of suit and such other and further relief as may be meet in the premises.

T. T. C. GREGORY,
THOS. A. ALLEN,
Attorneys for Plaintiff.

City, County and State of New York,
Borough of Manhattan,—ss.

Edith H. Wakefield, being first duly sworn, deposes and says that she is the plaintiff named in the foregoing complaint; that she has read the same and knows the contents thereof; and that the same is true of her own knowledge except as to the mat-

ters therein stated on information and belief and as to those matters she believes it to be true.

EDITH H. WAKEFIELD.

Subscribed and sworn to before me this 8th day of May, 1917.

[Seal] B. M. SWIFT,

Commissioner of Deeds, City of New York, Residing in New York County.

New York County Clerk's No. 209.

New York County Register's No. 19080.

Commission expires April 24th, 1919. [7]

No. 19,934—Series B.

State of New York,

County of New York,—ss.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for said county, the same being a Court of Record, DO HEREBY CERTIFY, That B. M. Swift, whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof or acknowledgment, a Commissioner of Deeds in and for the City of New York, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and also to administer oaths to be used in any Court in said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Com-

missioner of Deeds, and verily believe that the signature to such deposition or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court and county, the 8 day of May, 1917.

[Seal] WM. F. SCHNEIDER,
Clerk.

[Endorsed]: Filed May 23, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

UNITED STATES OF AMERICA.

In the Southern Division of the District Court of the United States, Northern District of California, Second Division.

EDITH H. WAKEFIELD,
Plaintiff,

vs.

JOHN D. SPRECKELS, Jr.,
Defendant.

Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City and County of San Francisco.

T. T. C. GREGORY and
THOS. A. ALLAN,
Plaintiffs' Attorneys.

(Summons.)

The President of the United States of America, GREETING, to John D. Spreckels, Jr., Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR and answer the complaint in an action entitled as above, brought against you in the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or she will apply to the Court for any other relief demanded in the complaint.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 23d day of May, in the year of our Lord one thousand nine hundred and seventeen and of our Independence the one hundred and forty-first.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. [9]

United States Marshal's Office,
Northern District of California.

I HEREBY CERTIFY, that I received the within writ on the 25th day of May, 1917, and per-

sonally served the same on the 25th day of May, 1917, upon John D. Spreckels, Jr., by delivering to, and leaving with, John D. Spreckels, Jr., said defendant named therein personally, at the City and County of San Francisco, in said District, a certified copy thereof, together with a copy of the complaint, attached thereto.

San Francisco, May 25, 1917.

J. B. HOLOHAN,
U. S. Marshal.
By J. M. Freeman,
Office Deputy.

[Endorsed]: Filed May 26, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

In the District Court of the United States for the Southern District of the Northern District of California, Second Division.

EDITH H. WAKEFIELD,

Plaintiff,

vs.

JOHN D. SPRECKELS, Jr.,

Defendant.

Amended Complaint on Contract.

Comes now the plaintiff above named and as of course files this, her amended complaint, and for cause of action alleges:

I.

That plaintiff is now and has been since on or

about the first day of September, 1916, a citizen of the State of New York and resident of the State and City of New York.

II.

That defendant has been at all the times herein mentioned and now is a citizen and resident of the State of California, and of the City and County of San Francisco, in the Northern District thereof.

III.

Plaintiff is and for more than one year last past has been the wife of Franklin W. Wakefield; that prior to her said marriage to said Franklin W. Wakefield, her name was Edith Marie Spreckels.

IV.

That on or about the 1st day of December, 1913, at the City and County of San Francisco, State of California, plaintiff and defendant made and entered into a certain agreement in writing in the words and figures as following, to wit: [11]

"THIS AGREEMENT, made and entered into this first day of December, 1913, by and between John D. Spreckels, Jr., the party of the first part, and Edith Marie Spreckels, his wife, the party of the second part, both of the City and County of San Francisco, State of California.

WITNESSETH:

That whereas, the party of the second part is about to commence a suit for divorce against the party of the second part and has employed Mr. Joseph T. O'Connor as her counsel for that purpose, and the party of the first part has employed

Mr. Samuel M. Shortridge to represent him in said suit; and

Whereas, said parties desire to avoid the expense of litigation over any and all questions as to their respective property rights, including the right of said second party to temporary and permanent alimony, and also desire to avoid any controversy over the care, custody and maintenance of the minor children of said parties; and

Whereas, said parties being fully and independdently advised by their respective counsel and each being fully informed as to his and her rights, duties and obligations growing out of their marriage relation, have come to an agreement as to each and all of said matters;

NOW, THEREFORE, in consideration of the mutual covenants each to the other running, and of other good and valuable consideration each to the other moving, have agreed and do hereby agree as follows, to wit:

1. That upon the due making and entry of an interlocutory decree of divorce in favor of the said second party the said first party will pay unto the said second party the sum of Three Hundred and Fifty ($350.00) Dollars, monthly, in advance, commencing with the date of the entry of said interlocutory decree, for the period of one year thereafter; that upon the due making and entry of a final decree of divorce in favor of the said second party, said first party will pay unto the [12] said second party, monthly, in advance, the sum of Three Hun-

dred and Fifty ($350.00) Dollars during the remaining period of her natural life.

2. That the said second party agrees to accept said several sums of Three Hundred and Fifty ($350.00) Dollars, monthly in advance, as and for and in full of her right or claim to temporary and permanent alimony, maintenance and support from the said first party.

3. That the said second party hereby releases, quitclaims and grants unto the said first party all her right, title and interest, past, present and future, in and to any anl all community property of the said parties hereto and in and to any and all separate property of the said first party.

4. That the said parties hereto have settled and do hereby forever settle all their property rights, including the right of the said second party to alimony, support and maintenance from the said first party, and that whatever property the said first party now has, be the same community or separate property, and whatever property he may hereafter acquire shall henceforth be considered as and be his separate property, and that whatever proportion the said second party now has or may hereafter acquire shall henceforth be considered as and be her separate property.

5. That whatever deeds or written instruments shall be necessary to effectuate the ends aforesaid and to quiet title to any property now owned or hereafter to be acquired by either of said parties shall be executed by the said parties hereto, each to the other, respectively, on demand.

6. That the care and custody of the minor children of said parties be and remain with and in the said second party, their mother, and that while said children are being supported and maintained by the said second party the said first party will pay to the said second party, for the support and maintenance of said children, the sum of [13] Three Hundred ($300.00) Dollars per month, in advance, that is to say, One Hundred ($100.00) Dollars per month for each of said children supported and maintained by said second party; that the said first party shall have the right to visit said children, and have said children visit him, at any and all times convenient to him and them; that none of said children shall be taken out of the State of California without the previous written consent and approval of both of the said parties hereto.

7. That the said second party shall have the possession and use of the household furniture and effects now in the present home of the said parties hereto, situated at number 1232 Washington Street, in said City and County.

8. That the said second party represents and agrees that she has incurred bills amounting to the sum of $1500.00, which are all the bills incurred by said second party and remaining unpaid, and which said first party agrees to pay.

And said second party agrees to save said first party harmless from the payment of any other bills now existing or hereafter to exist by her incurring, and that if any should come up and be paid by said first party, that he may deduct the same from any

alimony to be paid to said second party under this agreement, or any decree of court.

9. That the provisions of this agreement shall not be modified or abrogated by any interlocutory decree or final decree of divorce in favor of the said second party which may be hereafter made and entered.

IN WITNESS WHEREOF, the said parties have each hereunto set his and her hand and seal, in duplicate, on this the day and year first above written. [14]

JOHN D. SPRECKELS, Jr. (Seal)
EDITH MARIE SPRECKELS. (Seal)

Signed, sealed and delivered on the 1st day of December, 1913, in the presence of

SAMUEL M. SHORTRIDGE.
JOS. T. O'CONNOR.

State of California,
City and County of San Francisco,—ss.

On this 1st day of December, in the year one thousand nine hundred and thirteen, before me, Charles Frances, a notary public, in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, appeared John D. Spreckels, Jr., and Edith Marie Spreckels, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the

City and County of San Francisco, State of California, the day and year in this certificate first above written.

CHARLES FRANCES,
Notary Public in and for the City and County of San Francisco, State of California. [15]

That thereafter said Edith Marie Spreckels filed an action for a divorce from said John D. Spreckels, Jr.; that thereafter the said action came on for trial in the Superior Court of the State of California, in and for the City and County of San Francisco, and on the 24th day of August, 1914, an interlocutory decree of divorce was made, signed, filed and entered therein in favor of the said Edith Marie Spreckels; that thereafter and on August 25th, 1915, a final decree of divorce was duly made and entered in said action in favor of said Edith Marie Spreckels; that said agreement heretofore set forth was not abrogated, modified or changed by said interlocutory or final decree of divorce, but ever since the execution thereof it has been and now is in full force and effect; that upon the entry of said interlocutory decree of divorce defendant commenced to and thereafter continued to make the monthly payments to plaintiff of Three Hundred Fifty Dollars ($350.00) under and by virtue of the said written agreement hereinabove set forth up to on or about April 1st, 1915; that since the said first day of April, 1915, the defendant has made no payments whatever on account of said monthly payments of Three Hundred Fifty Dollars ($350.00) except the sum of Two Hundred Dollars ($200.00)

VI.

That the minor children of the parties were and are Marie R. Spreckels, Adolph B. Spreckels, and John D. Spreckels III, and the said children are the minor children referred to in said written agreement above set forth.

VII.

That the said Adolph B. Spreckels was supported and maintained by the plaintiff from the first day of February, 1916, to the first day of September, 1916; that plaintiff has not paid anything for the support and maintenance of said Adolph B. Spreckels during said period. [16]

VIII.

That since the entry of said interlocutory decree of divorce plaintiff has supported and maintained said Marie R. Spreckels; that plaintiff has expended from time to time and at different times from the entry of said interlocutory decree of divorce down to the present time, for and on behalf of said Marie R. Spreckels, and for her maintenance and support during said period, an amount in excess of one thousand dollars; that said payments during said period did not equal the sum of one hundred dollars a month; that said amount so paid together with all amounts that were paid by defendant for the support and maintenance of said Marie R. Spreckels during said period did not equal the sum of one thousand dollars and did not equal the sum of one hundred dollars a month during such period; that no part of said sum in excess of one thousand dollars has been paid by defendant.

IX.

That plaintiff has duly performed all the conditions of said agreement on her part to be kept and performed.

WHEREFORE, plaintiff demands judgment against defendant for the sum of Ten Thousand Three Hundred Dollars ($10,300.00) together with interest on all said deferred payments from the time the same become due, at the rate of seven per cent per annum; cost of suit and such other and further relief as may be meet in the premises.

T. T. C. GREGORY,
THOS. A. ALLAN,
Attorneys for Plaintiff. [17]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Thos. A. Allan, being first duly sworn, deposes and says that he has read the foregoing amended complaint and knows the contents thereof; that he verily believes the facts therein stated to be true; that he makes this affidavit for and on behalf of plaintiff for the reason that plaintiff is absent from the City and County of San Francisco, and is in the City of New York, State of New York; that affiant is one of plaintiff's attorneys and has his office in the said City and County of San Francisco.

THOS. A. ALLAN.

Subscribed and sworn to before me this 23d day of June, 1917.

[Seal] M. V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California.

Received copy of within amended complaint on contract and receipt of copy thereof, hereby admitted this 23d day of June, 1917.

SAMUEL M. SHORTRIDGE,
Attorney for Defendant.

[Endorsed]: Filed June 25, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

(Title of Court and Cause.)

Demurrer to Amended Complaint.

The defendant demurs to the plaintiff's amended complaint on the following grounds:

I.

That the amended complaint does not state facts sufficient to constitute a cause of action.

II.

That the amended complaint is unintelligible in respect of paragraph VIII thereof; that it cannot be determined what the pleader means by the averments of the said paragraph; or during what period of time since the entry of the Interlocutory Decree plaintiff has supported and maintained Marie R. Spreckels; whether she expended in excess of one thousand dollars or any other sum for her main-

tenance and support during said period; or whether the sum alleged to have been expended "on behalf of said Marie R. Spreckels" was for a purpose other than for her maintenance and support; or what sums in that behalf the defendant has paid; or for what period or periods since the entry of the Interlocutory Decree, the said Marie R. Spreckels being supported and maintained by plaintiff, defendant failed to pay plaintiff one hundred dollars per month under said agreement.

III.

The complaint is uncertain in the same respects in which it is hereinabove alleged to be unintelligible.

IV.

That the complaint is ambiguous in the same respects it is hereinabove alleged to be unintelligible.

WHEREFORE, the defendant prays that plaintiff take nothing by her amended complaint and that defendant may go hence [19] with his proper costs herein incurred.

SAMUEL M. SHORTRIDGE,
Attorney for Defendant.

Due service and receipt of a copy of the within demurrer to amended complaint is hereby admitted this third day of July, 1917.

T. T. C. GREGORY,
THOS. A. ALLAN,
Attorneys for Plaintiff.

[Endorsed]: Filed July 3, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

At a stated term, to wit, the July term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday the 9th day of July, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,077.

EDITH H. WAKEFIELD

vs.

JOHN D. SPRECKELS, Jr.

Minutes of Court—July 9, 1917—Order Overruling Demurrer to Amended Complaint.

Defendant's demurrer to the amended complaint came on to be heard and after argument being submitted and fully considered, it is ordered that said demurrer be and the same is hereby overruled with leave to defendant to answer within ten days. [21]

In the District Court of the United States for the Southern Division of the Northern District of California, Second Division.

No. 16,077.

EDITH H. WAKEFIELD,

Plaintiff,

vs.

JOHN D. SPRECKELS, Jr.,

Defendant.

Answer to Amended Complaint.

Comes now the defendant in the above-entitled action and answering the amended complaint denies and alleges as follows, to wit:

I.

Admits that the plaintiff filed an action for divorce against the defendant and that thereafter said action came on for trial in the Superior Court of the State of California in and for the City and County of San Francisco.

Admits that on the 24th day of August, 1914, an interlocutory decree of divorce was made, signed and filed in said action in favor of the plaintiff.

Admits that on August 25th, 1915, a final decree of divorce in said action was duly made and entered in favor of the plaintiff; denies that the agreement set forth in said amended complaint was not abrogated, modified and/or [22] changed by said interlocutory decree; denies that ever since the execution of said agreement and/or at any time since

the entry of said interlocutory decree the said agreement has been or now is in full force and/or effect.

Alleges that the defendant has paid to the plaintiff the moneys mentioned in paragraph V of said amended complaint but denies that the said payments or any of them were made under and/or by virtue of said written agreement.

II.

Denies that at any time since the 12th day of February, 1915, the plaintiff has supported and/or maintained the said minor child Marie R. Spreckels; alleges that the defendant has paid to the plaintiff for the support and maintenance of the said minor child the sum of one hundred dollars for the period from August 1st, 1914, to and including February 12th, 1915; denies upon information and belief that the plaintiff has expended from time to time or at different times from the entry of said interlocutory decree or at all, and/or on behalf of said Marie R. Spreckels and/or for her maintenance and/or support during the said period an amount in excess of one thousand dollars or any other sum.

III.

Denies that the plaintiff has performed all the conditions of said agreement on her part to be kept and/or performed. [23]

For further and separate defense to the plaintiff's cause of action the defendant alleges:

That subsequent to the making of the agreement set forth in the amended complaint, to wit, on De-

cember 5th, 1913, the plaintiff herein commenced an action against the defendant herein in the Superior Court of the State of California in and for the City and County of San Francisco to obtain a decree dissolving the bonds of matrimony existing between said parties and awarding to the plaintiff the custody of the minor children of said parties as well as alimony, counsel fees and costs in a reasonable sum to be fixed and specified in said decree, as well as a reasonable sum for the maintenance, care and education of said children, and in that behalf the plaintiff alleged in her complaint filed in the said action that there were three children, the issue of said marriage between the plaintiff and the defendant, to wit, the said Marie R. Spreckels, Adolph B. Spreckels and John D. Spreckels III, and that the plaintiff was a proper person to have their care, custody and control, and the plaintiff further alleged in and by her said complaint that the defendant in the said action was in receipt of an income sufficient to pay any reasonable sum as alimony, counsel fees and costs and any reasonable sum for the maintenance, care and education of said children.

That thereupon the defendant in said action, to wit, this defendant, appeared in the said action and answered the plaintiff's said complaint and the said matters came on regularly to be heard on the 22d day of August, 1914; the said plaintiff and the said defendant appeared by their respective counsel, whereupon proofs were taken and the Court after due consideration ordered, adjudged and decreed,

as and for an interlocutory decree therein, that the plaintiff was [24] entitled to an interlocutory decree adjudging that she had established grounds for the dissolution of the bonds of matrimony theretofore and then existing between the plaintiff and the defendant.

And the Court, after such due consideration of the said cause and the said proofs, further ordered and decreed as follows, to wit: That the custody of the children of the plaintiff and the defendant, to wit, said Marie R. Spreckels, Adolph B. Spreckels and John D. Spreckels, III, be and the same is hereby awarded to the plaintiff; that the defendant pay to the plaintiff for her support during her life the sum of ten dollars per month; that the defendant pay to the plaintiff for the support and maintenance of each of said children the sum of one hundred dollars per month during minority.

That the said interlocutory decree was never appealed from; that it was never set aside or modified in any way; that after the making thereof thenceforth it continued to be, and now is, in full force and effect and the said written agreement set forth in the plaintiff's amended complaint as well as all previous provisions made for the support or maintenance of the plaintiff or the said minor children or for her permanent alimony became superseded by and merged in the said interlocutory decree.

That the defendant has paid to the plaintiff all sums due to her under or by virtue of the said interlocutory decree.

For further and separate defense to the plaintiff's cause of action the defendant alleges:

That immediately following the making of said agreement the defendant placed the plaintiff in the possession of the household furniture and effects mentioned in the said agreement described as then, and being, in the home of said [25] parties, situated at No. 1232 Washington Street in said City and County; that the said household furniture and effects were and are the separate property of the defendant and are of the value of upwards of twenty thousand dollars; that the said property was placed in the possession of the plaintiff by the defendant, under and by virtue of the said agreement in order that she might have the use thereof for herself and the said children; that thereafter and prior to the commencement of this action and without the knowledge or consent of the defendant, and in violation of the said agreement, the plaintiff ceased to use the said property for said purposes, and has failed and refused, and now fails and refuses, to redeliver the said property to the defendant or to put the defendant in possession of the same.

That ever since the month of June, 1915, the plaintiff has failed, refused and neglected to take or assume the care or custody of the minor children of said parties or any of them, for any portion of the time subsequent to June 5, 1915, except that she had the care and custody of said Adolph B. Spreckels from about the 1st day of February, 1916, to about the 31st day of August, 1916.

For further and separate defense to plaintiff's cause of action the defendant alleges:

That in and by the agreement in writing set forth in the amended complaint the plaintiff represented and agreed that she had incurred bills amounting to the sum of $1500.00 and that the same were all the bills incurred by her and remaining unpaid, which said bills amounting to $1500.00 the defendant agreed to pay. That the plaintiff agreed to save the defendant harmless in the payment of any other bills then existing or thereafter to exist incurred by her in excess of [26] the sum of $1500.00 and agreed that if any such bills should come up or be paid by said defendant that he might deduct the amount thereof from any alimony to be paid to her under the said agreement or under any decree of court.

Alleges that at the time of making said agreement the plaintiff had incurred bills amounting to the sum of $2258.68, which said bills were then existing, outstanding and unpaid; that she did not save the defendant harmless from the payment of that portion of said amount in excess of $1500.00, but that said bills did come up and were paid by the defendant to the amount of $2258.68, said sum being $758.68 in excess of the amount so limited, no part of which excess has ever been repaid to the defendant.

WHEREFORE, the defendant prays that the plaintiff take nothing by her action, but that the defendant have judgment for his proper costs.

SAMUEL M. SHORTRIDGE,
Attorney for Defendant. [27]

State of California,
City and County of San Francisco,—ss.

John D. Spreckels, Jr., being first duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the foregoing answer to amended complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

JOHN D. SPRECKELS, Jr.

Subscribed and sworn to before me this 5th day of September, 1917.

[Seal] JULIA W. CRUM,
Notary Public, in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within answer to amended complaint is hereby admitted this 5th day of September, 1917.

T. T. C. GREGORY,
T. A. ALLAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 5, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

(Title of Court and Cause.)

(Stipulation Waiving Jury.)

It is hereby stipulated and agreed between the parties hereto that a jury trial is hereby waived in the above-entitled action, and said action is hereby set for July 14, 1920.

Dated: May 28th, 1920.

JAMES F. PECK,
CHARLES W. BYRNES,
Attorneys for Plaintiff.
SAMUEL M. SHORTRIDGE,
Attorney for Defendant.

Approved: WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed June 5, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

(Title of Court and Cause.)

Findings of Fact and Conclusions of Law.

This cause came on for trial before the Court, Honorable Wm. H. Sawtelle, sitting as Judge of the District Court of the United States for the Southern Division of the Northern District of the State of California, Second Divison; Samuel M. Shortridge, Esq., and Bert Schlesinger, Esq., appearing as attorneys for the defendant, and James F. Peck, Esq., and Charles W. Byrnes, Esq., appearing as attorneys for the plaintiff; evidence was produced by the respective parties, plaintiff and defendant, and after argument the cause was submitted for decision. The defendant, before submission of the cause, requested and the Court granted the request for findings. The Court now finds upon the facts at issue as follows:

1. That the plaintiff at the time of filing the complaint herein and for a long time thereafter

was a citizen of the State of New York and a resident of the State and City of New York.

2. That the defendant was at the time of filing the complaint herein and for a long time prior thereto had been, a citizen and resident of the State of California and of the City and County of San Francisco, and in the Northern District.

3. That plaintiff is and at the time of the filing of the complaint herein was, and for more than one year prior thereto had been the wife of Franklin W. Wakefield. That prior to the said marriage to said Franklin W. Wakefield her name was Edith Marie Spreckels.

4. That on or about the first day of December, 1913, at the City and County of San Francisco, State of California, plaintiff and defendant made and entered into a certain agreement in writing, a copy of which said agreement is contained in paragraph IV of the plaintiff's amended complaint here. [30]

5. That the purpose of said contract and of the parties thereto was not to bring about a dissolution of the marriage relation, or to put an end to said marriage relation, or to facilitate procuring a divorce by either party thereto; and the making of the contract did not influence or tend to influence the plaintiff in procuring a divorce from defendant, and it did not influence or tend to influence defendant in resisting plaintiff's application therefor; and the making of said contract was not intended by the parties thereto, or either of them, to influence or tend to influence the plaintiff in procuring a divorce from the defendant; and the mak-

ing of the said contract was not intended by the parties thereto, or either of them, to influence or tend to influence the defendant in resisting plaintiff's action for divorce, and the said contract was not intended to and did not influence or tend to influence the plaintiff in commencing or prosecuting the action to procure a divorce from defendant alleged in plaintiff's complaint, or the defendant in resisting plaintiff's action for divorce.

6. That there was no collusion between the parties to said contract or to said divorce proceedings and that at the trial therein, as appears in the interlocutory decree, upon the proofs taken therein, the Court found all of the allegations of the complaint were true and that they were sustained by the testimony.

7. That said contract was not induced by and was not because of or based upon any consideration of any promise or understanding that an action should be commenced to dissolve the marriage then existing between plaintiff and defendant, but was made because of a desire of each of the contracting parties to avoid the expense of litigation over any and all questions as to their respective property rights, including [31] the right of said second party in said contract, the plaintiff herein, to temporary and permanent alimony and to avoid any controversy over the care, custody and maintenance of the minor children of said parties, and upon the mutual covenants each to the other running, and all other good and valuable considerations each to the other moving.

8. That subsequent to the making of the agreement set forth in the amended complaint, to wit, on December 5th, 1913, the plaintiff herein commenced an action against the defendant herein in the Superior Court of the State of California, in and for the County of San Francisco, to obtain a decree dissolving the bonds of matrimony existing between said parties and awarding to the plaintiff the custody of the minor children of said parties, as well as alimony, counsel fees and costs, in a reasonable sum, to be fixed and specified in said decree, and a reasonable sum for the care, maintenance and education of said minor children, and in said complaint, as grounds for divorce, the said plaintiff alleged therein that the defendant had wrongfully inflicted and now wrongfully inflicts upon plaintiff grevious mental suffering, resulting in grevious bodily injury, which acts of cruelty were specifically stated in said complaint, and plaintiff's said complaint filed in said divorce action plaintiff alleged that there were three children the issue of the marriage between the plaintiff and defendant, to wit, the said Marie Spreckels, Adolph Spreckels, and John D. Spreckels, III, and that the plaintiff was the proper person to have their care, custody and control; and the plaintiff further alleged in and by her said complaint in said divorce action that the defendant in said action was in receipt of an income sufficient to pay any reasonable sum as alimony, counsel feees and costs, and any reasonable sum for the maintenance, care and education of the said children [32]

9. That thereafter the defendant in said divorce

action, to wit, the defendant in this action appeared in said action and answered the plaintiff's said complaint and denied the allegations of cruelty alleged in plaintiff's complaint in said divorce action specifically.

That the said trial of said divorce action came on regularly to be heard before the Superior Court of the City and County of San Francisco, State of California, on the 22d day of August, 1914. The said plaintiff and said defendant appeared in said action at said trial by their respective counsel. Whereupon evidence was produced before the Court and the Court, in said divorce action, found that all the allegations of the complaint therein were true and they were sustained by testimony free from all legal exceptions as to its competency, admissibility and sufficiency, and that all the allegations of the defendant's answer in the divorce action were untrue.

10. That the plaintiff and defendant had been living separate and apart for a period of more than one year, continuously, before the making of said contract alleged in paragraph IV of the amended complaint herein.

11. That the parties did not at the time of entering into the said contract intend that the contract should be merged in any decree of divorce, interlocutory or final, which might be subsequently rendered by any Court granting a decree of divorce.

12. That on the 25th day of August, 1915, in the said divorce action commenced in the Superior Court of the State of California, in and for the City

and County of San Francisco, a final decree of divorce in said action was duly given, made and entered, and therein it was adjudicated, among other things, that the judgment shall not effect the said contract alleged in paragraph IV of the amended complaint herein. [33]

13. That the said contract alleged in paragraph IV of the amended complaint herein was not merged in the said interlocutory or final decree of divorce, and the said contract is in full force and effect.

14. That the plaintiff has not ceased to use the said household furniture and effects mentioned in and described in the said contract set out in paragraph IV of the amended complaint herein, and the same is now in the possession of the plaintiff.

15. That in and by the agreement in writing set forth in the amended complaint, plaintiff represented and agreed that she had incurred bills amounting to the sum of Fifteen Hundred Dollars ($1500.00) and that the same were all the bills incurred by her remain*ed* unpaid, which said bills, to the amount of Fifteen Hundred Dollars ($1500.00), the defendant agreed to pay. That the plaintiff agreed to save the defendant harmless in the payment of any other bills then existing or thereafter to exist incurred by her, in excess of Fifteen Hundred Dollars ($1500.00), and agreed that if any such bills in excess of Fifteen Hundred Dollars ($1500.00) should come up or be paid by said defendant that he might deduct the amount thereof from any sum to be paid to plaintiff under the said agreement. That at the time of making said agree-

ment the plaintiff had incurred bills amounting to the sum of Two Thousand Two Hundred Fifty-eight and 60/100ths Dollars ($2225.68), which said bills were then existing, outstanding and unpaid. That said bills did come up and were paid by the said defendant to the said amount of Two Thousand Two Hundred Fifty-eight and 68/100ths Dollars ($2258.68), that is, to the sum of Seven Hundred Fifty-eight and 68/100ths Dollars ($758.68) in excess of the said Fifteen Hundred Dollars ($1500.00). That no part of said excess of Seven Hundred Fifty-eight and 68/100ths Dollars ($758.68) has ever been paid to the defendant by the plaintiff. [34]

16. That said defendant paid the plaintiff monthly the sum of Three Hundred and Fifty Dollars ($350.00) up to but not including the 24th day of April, 1915. That said defendant did not pay the installment of Three Hundred and Fifty dollars ($350) promised in said contract to be paid on the 24th day of April, 1915, but did pay on account thereof the sum of Two Hundred Dollars ($200.00). That no sum was paid by the defendant to plaintiff on account of said Three Hundred and Fifty Dollars ($350.00) monthly promised in said contract to be paid except that said monthly sum of Three Hundred and Fifty Dollars ($350.00) was paid in advance monthly from and including the 24th day of August, 1914, to and including the 24th day of March, 1915, and that said sum of Two Hundred Dollars ($200.00) was paid on the 24th day of April, 1915.

17. That the plaintiff paid for the support and

maintenance of the said child, Adolph B. Spreckels, from and including the first day of February, 1916, to and including the first day of September, 1916. That the defendant has not paid the sum of One Hundred Dollars ($100.00) per month promised in said contract to be paid for the support and maintenance of the said Adolph B. Spreckels for the said period of time, or any part thereof.

That the said defendant has not paid the sum of Three Hundred and Fifty Dollars ($350.00) monthly promised in said contract to be paid plaintiff on the 24th day of April, 1915, except the said sum of Two Hundred Dollars ($200.00), nor has the defendant paid to the plaintiff the installment of Three Hundred and Fifty Dollars ($350.00) monthly, or any part thereof, so promised to be paid since the 24th day of May, 1915.

18. Counsel for the defendant having, at the trial, avowed that there was no defense interposed to this action on the ground that the deeds referred to in the contract and record were not executed as provided in the contract and that the same was not an [35] issue herein, and having objected to the introduction of testimony with reference thereto, the said objection was sustained and the testimony so offered was excluded.

That all facts alleged in the complaint are true except as to those hereinbefore otherwise specified.

Conclusions of Law.

As conclusions of law the Court finds that the plaintiff is entitled to recover judgment against the

defendant for the sum of Eight Thousand, Five Hundred and Fifty Dollars ($8,550.00) and interest thereon at the rate of seven per cent (7%) per annum to date as follows:

On One Hundred and Fifty Dollars ($150.00) thereof from April 24th, 1915, and on one of each of the Three Hundred and Fifty Dollars ($350.00) contained in said balance thereof from the 24th day of each succeeding month thereafter to and including the 24th day of April, 1917; and is further entitled to recover judgment against defendant for the sum of Seven Hundred Dollars ($700.00), with interest thereon at the rate of seven per cent (7%) per annum to date, as follows: On one of each of the One Hundred Dollars ($100.00) contained in said Seven Hundred Dollars ($700.00) from the first day of each month from and including September 1st, 1916, inclusive, from which should be deducted the sum of Seven Hundred Fifty-eight and 68/100ths Dollars ($758.68) and interest on said Seven Hundred Fifty-eight and 68/100ths Dollars ($758.68) from the first day of December, 1913, to date at the rate of seven per cent (7%) per annum.

That the said contract mentioned in paragraph IV of plaintiff's amended complaint was not merged or superseded by the interlocutory or final decree of divorce alleged in defendant's answer, and the said contract is in full force as a subsisting and binding agreement and is not void or invalid or in the contravention of public policy.

WM. H. SAWTELLE,

Judge of the United States District Court. [36]

Receipt of a copy of the within findings of fact and conclusions of law is hereby admitted this 8th day of February, 1921.

BERT SCHLESINGER,
SAMUEL M. SHORTRIDGE,
Attorneys for Defendant.

[Endorsed]: Filed June 18, 1921. Walter B. Maling, Clerk. [37]

(Title of Court and Cause.)

Judgment.

Trial by jury was waived. The defendant, before submission of the case, requested and the Court granted the request for findings. The Court signed and filed findings in the case on the 18th day of July, 1921, and therein ordered that judgment be entered in accordance therewith.

WHEREFORE, pursuant to said findings and the order therein contained, it is ORDERED, ADJUDGED AND DECREED that Edith H. Wakefield recover judgment against the defendant John D. Spreckels, Jr., for the sum of Eleven Thousand Four Hundred and Thirteen and 52/100 ($11,413.52) Dollars, being Eight Thousand Five Hundred and Fifty Dollars ($8550), and interest thereon at the rate of seven per cent (7%) per annum, as follows:

On One Hundred and Fifty Dollars ($150) of said Eight Thousand Five Hundred and Fifty Dollars ($8550) from April 24th, 1915, and on one

of each of the Three Hundred and Fifty Dollars ($350) contained in said balance of said Eight Thousand Five Hundred and Fifty Dollars ($8550) from the 24th day of each succeeding month after April 24th, 1915, to and including the 24th day of April, 1917; and Seven Hundred Dollars ($700), with interest on said Seven Hundred Dollars at the rate of seven per cent (7%) per annum to the 18th day of June 1921, as follows: On one of each of the One Hundred Dollars ($100) contained in said Seven Hundred Dollars ($700) from the 1st day of each month from and including September 1st, 1916, less the sum of Seven Hundred Fifty-eight Dollars and 68/100ths ($758.68) and interest on said $758.68 from the first day of December, 1913, to the 18th day of June, 1921, at the rate of seven per cent (7%) per annum, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said contract mentioned in paragraph IV of plaintiff's amended [38] complaint was not merged or superseded by the interlocutory or final decree of divorce alleged in defendant's answer, and the said contract is in full force as a subsisting and binding agreement and is not void or invalid or in the contravention of public policy.

Judgment entered this 18th day of June, 1921.

WALTER B. MALING,
Clerk. [39]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,077.

EDITH H. WAKEFIELD,

Plaintiff,

vs.

JOHN D. SPRECKELS, Jr.,

Defendant.

Order Substituting Party Defendant.

It appearing to the satisfaction of the Court that John D. Spreckels, Jr., the defendant above named is dead, and that John D. Spreckels, his father, has by order of the Superior Court of the State of California, for the City and County of San Francisco, been appointed special administrator of the Estate of John D. Spreckels, Jr., deceased, and has duly qualified as such administrator; on motion of Samuel M. Shortridge, attorney of record for the defendant in the above-entitled action, and pursuant to Rule 102 of this Court, it is ordered that John D. Spreckels, special administrator of the estate of John D. Spreckels, Jr., deceased, be and he is hereby substituted as the defendant in the above-entitled action in lieu of John D. Spreckels, Jr., deceased, and it is further ordered that this action be continued by the said John D. Spreckels, special administrator of the estate of John D. Spreckels, Jr., deceased, substituted as defendant

herein in lieu of John D. Spreckels, Jr., deceased; and further ordered that all papers and proceedings in this action [40] be hereafter entitled accordingly.

Dated: December 14, 1921.

FRANK H. RUDKIN,
United States District Judge.

[Endorsed]: Filed Dec. 14, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [41]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,077.

EDITH H. WAKEFIELD,

Plaintiff,

vs.

JOHN D. SPRECKELS, Jr.,

Defendant.

Admission of Service of Order of Substitution.

Received this 14th day of December, 1921, certified copy of order substituting John D. Spreckels, Special Administrator of the Estate of John D. Spreckels, Jr., deceased, as party defendant in the above-entitled action, in lieu of John D. Spreckels, Jr., deceased, and that said action be continued by the said John D. Spreckels, special administrator

of the Estate of John D. Spreckels, Jr., deceased, substituted as defendant herein.

JAMES F. PECK,
CHARLES W. BYRNES,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 14, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [42]

In the District Court of the United States for the Southern Division of the Northern District of California, Second Division.

EDITH H. WAKEFIELD,

Plaintiff,

vs.

JOHN D. SPRECKELS, Special Administrator of the Estate of JOHN D. SPRECKELS, Jr., Deceased,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on regularly for trial on the 14th day of July, 1920, at the hour of ten o'clock A. M. of said day, Hon. Wm. H. Sawtelle, Judge presiding, a trial by jury having been expressly waived by the parties; James F. Peck, Esq. and Charles W. Byrnes, Esq., appearing as attorneys for the plaintiff, and Bert Schlesinger, Esq., appearing as attorney for the defendant; whereupon the following proceedings were had and testimony taken:

Testimony of Edith Huntington Wakefield, in Her Own Behalf.

EDITH HUNTINGTON WAKEFIELD, called as a witness for the plaintiff, being duly sworn, testified as follows:

"My name is Edith H. Wakefield. I am the wife of Mr. Frank Wakefield at the present time. I was the wife, at one time, of the defendant John D. Spreckels, Jr.

At the time this suit was brought, during the year 1917, I resided in New York City with my husband. At that time John D. Spreckels, Jr., resided in San Francisco.

In this agreement made and entered into between myself and John D. Spreckels, Jr., there was certain household furniture [43] mentioned. That household furniture has been, since the time of the interlocutory decree of divorce between myself and Mr. Spreckels first at a house on Filbert Street, in San Francisco; then I put it in storage with the Pierce Rodolph Stringer Company, in San Francisco, and I next put it in a house on Hyde Street, in San Francisco. Part of it is there now, and part of it in the Stringer warehouse, and some of it is down at Papeete, in Tahiti. That furniture has been in my possession and control since the time of the interlocutory divorce between myself and Mr. Spreckels, and it is now."

The plaintiff then introduced in evidence the following agreement:

THIS AGREEMENT made and entered into this 1st day of December, 1913, by and between John D. Spreckels, Jr., the party of the first part, and Edith Marie Spreckels, his wife, the party of the second part, both of the City and County of San Francisco, State of California,

WITNESSETH:

That whereas, the party of the second part is about to commence a suit for divorce against the party of the second part and has employed Mr. Joseph T. O'Connor as her counsel for that purpose, and the party of the first part has employed Mr. Samuel M. Shortridge to represent him in the said suit; and,

Whereas, said parties desire to avoid the expense of litigation over any and all questions as to their respective property rights, including the right of said second party to temporary and permanent alimony, and also desire to avoid any controversy over the care, custody and maintenance of the minor children of said parties; and,

Whereas, said parties being fully and independently advised by their respective counsel and each being fully informed as to his and her rights, duties and obligations growing out of their marriage relation, have come to an agreement as to each and all of said matters;

NOW THEREFORE, in consideration of the mutual covenants each to the other running, and of other good and valuable considerations each to the other moving, have agreed and do hereby agree as follows, to wit:

1. That upon the due making and entry of an interlocutory decree of divorce in favor of the said party of the first party will pay unto the said second party the sum of Three Hundred and Fifty ($350.00) Dollars, monthly, in advance, commencing with the date of the entry of said interlocutory decree, for the period of one year thereafter; that upon the due making and entry of a final decree of divorce in favor of the said second party, said [44] first party will pay unto the said second party, monthly, in advance, the sum of Three Hundred and Fifty ($350.00) Dollars during the remaining period of her natural life.

2. That the said second party agrees to accept said several sums of Three Hundred and Fifty ($350.00) Dollars, monthly, in advance, as and for and in full of her right or claim to temporary and permanent alimony, maintenance and support from the said first party.

3. That the said second party hereby releases, quitclaims and grants unto the said first party all her right, title and interest, past, present and future, in and to any and all community property of the said parties hereto and in and to any and all separate property of the said first party.

4. That the said parties hereto have settled and do hereby forever settle all their property rights, including the right of the said second party to alimony, support and maintenance from the said first party, and that whatever property the said first party now has, be the same community or separate property, and whatever property he may

hereafter acquire shall henceforth be considered as and be his separate property, and that whatever property the said second party now has or may hereafter acquire shall henceforth be considered as and be her separate property.

5. That whatever deeds or written instruments shall be necessary to effectuate the ends aforesaid and to quiet title to any property now owned or hereafter to be acquired by either of said parties shall be executed by the said parties hereto, each to the other, respectively, on demand.

6. That the care and custody of the minor children of said parties be and remain with and in the said second party, their mother, and that while said children are being supported and maintained by the said second party the said first party will pay to the said second party, for the support and maintenance of said children, the sum of Three Hundred ($300.00) Dollars per month, in advance, that is to say, One Hundred ($100.00) Dollars per month for each of said children supported and maintained by said second party; that the said first party shall have the right to visit said children, and have said children visit with him, at any and all times convenient to him and them; that none of said children shall be taken out of the State of California without the previous written consent and approval of both of the said parties hereto.

7. That the said second party shall have the possession and use of the household furniture and effects now in the present home of the said parties

hereto, situated at number 1232 Washington Street, in said City and County.

8. That the said second party represents and agrees that she has incurred bills amounting to the sum of $1500.00, which are all the bills incurred by said second party and remaining unpaid, and which said first party agrees to pay. [45]

And said second party agrees to save said first party harmless from the payment of any other bills now existing or hereafter to exist by her incurring, and that if any should come up and be paid by said first party, that he may deduct the same from any alimony to be paid said second party under this agreement, or any decree of court.

9. That the provisions of this agreement shall not be modified or abrogated by any interlocutory decree or final decree of divorce in favor of the said second party which may be hereafter made and entered.

IN WITNESS WHEREOF, the said parties have each hereunto set his and her hand and seal, in duplicate, on this the day and year first above written.

JOHN D. SPRECKELS, Jr. (Seal)
EDITH MARIE SPRECKELS. (Seal)

Signed, sealed and delivered on the 1st day of December, 1913, in the presence of

SAMUEL M. SHORTRIDGE,
JOS. T. O'CONNOR.

Acknowledged before

CHARLES FRENCES, N. P."

(Testimony of Edith Huntington Wakefield.)

That plaintiff introduced evidence of the performance by her of all the covenants and promises on her part in said agreement on her part to be performed.

"I have not been paid anything on account of this contract since April 15, 1915. The payments were made to me on account of the contract to the 15th of April, 1915. Adolph, one of the children of Mr. Spreckels and myself, has been with me for a period of six months, and I have maintained him. I have not received the $100 a month for the maintenance of that child. (Tr. p. 7.) [46] I have not received the sum of $350 a month, or any part of it, from the 15th day of April, 1915, down to the present time. The minor children of this marriage are Mary, Adolph and John. (Tr. p. 8)"

On cross-examination the witness testified as follows:

"My two boys are in a school down at Palo Alto. The children are in my custody. They are in California. I haven't them with me in the East, because we are traveling to such an extent, myself and my husband, that it is not well for the children to have them with us all the time on account of their schooling. The decree of divorce provided that I should have the legal custody of the children, because that was stipulated in the contract. Since that decree I have lived out of the State.

At the time I had Adolph down in Papette I contributed toward his support. I have not maintained them at school, because I had an arrange-

(Testimony of Edith Huntington Wakefield.)

ment with Mr. Spreckels' father to maintain them for me, and their maintenance has been paid for by Mr. Spreckels.

I reside in New York. New York is our home when not traveling.

Q. Mrs. Spreckels, I will call your attention to clause 1 of the agreement:

'That upon the due making and entry of an interlocutory decree of divorce in favor of the said second party the said first party will pay unto the said second party the sum of $350, monthly, in advance, commencing with the date of the entry of said interlocutory decree, for the period of one year thereafter; that upon the due making and entry of a final decree of divorce in favor of the said second party, said first party will pay unto the said second party, monthly in advance, the sum of $350, during the remaining period of her natural life.'

[47]

'That the said second party agrees to accept said several sums of $350, monthly in advance, as and for and in full of her right or claim to temporary and permanent alimony, maintenance and support, from said first party.'

Did you have any discussion concerning those two clauses of the agreement before the agreement was executed, with Mr. Spreckels? A. No.

Q. But you, of course, knew of those clauses and were familiar with them before you signed the document?

(Testimony of Edith Huntington Wakefield.)

A. We just spoke about the community property and about the alimony.

Q. You understood that if you should obtain a decree of divorce, that you were to be paid the sums of money therein mentioned in the contract, did you?

A. I did not understand that; I knew I was going to get my alimony.

Q. Did you understand the agreement, Mrs. Wakefield, before you signed it?

A. For the community property and alimony, yes.

Q. These different clauses were read to by your attorney, Mr. O'Connor, who at that time represented you?

A. I think it was entirely in Mr. O'Connor's hands.

Mr. Joseph T. O'Connor was my attorney. Mr. Shortridge represented Mr. Spreckels.

This agreement was followed by a suit for divorce brought by me, and that proceeding went to a judgment in my favor. I obtained a decree.

I recall that this agreement contains a clause that I was to maintain the children.

I never had the children out of the state with the exception of Adolph, when I had permission from Mr. Spreckels to take him. (Tr. pp. 8–11) [48]

On redirect examination the witness testified as follows:

At the time this agreement was signed at the

(Testimony of Edith Huntington Wakefield.)

office of Mr. O'Connor, I read it over. Mr. Spreckels was there, but not Mr. Shortridge. (Tr. p. 11)

Mr. PECK.—That is our case.

Whereupon the defendant proceeded with his defense to said action, and made the following offer.

Mr. SCHLESINGER.—If your Honor please, we will now offer in evidence, on behalf of the defendant, a certified copy of the judgment-roll in the case of Edith Marie Spreckels v. John D. Spreckels, Jr., and numbered in the Superior Court of the City and County of San Francisco, 53,231. The judgment-roll consists of the complaint in divorce, the answer of the defendant, the interlocutory decree of divorce, and the final decree of divorce. These papers are duly and properly certified.

The COURT.—They will be admitted.

(The document was here marked Defendant's Exhibit "A,") (Tr. p. 11.) [49]

Defendant's Exhibit "A."

In the Superior Court of the City and County of San Francisco, State of California.

EDITH MARIE SPRECKELS,

Plaintiff,

vs.

JOHN D. SPRECKELS, Jr.,

Defendant.

Complaint in Divorce.

Plaintiff complains of defendant and for cause of action alleges:

I.

That plaintiff is now, and for more than one year next preceding the commencement of this action has been, a resident of the State of California and of the City and County of San Francisco, in said state, actually living and residing therein.

II.

That plaintiff and defendant intermarried in the City and County of San Francisco, State of California, on the 15th day of December, 1902, and ever since have been, and now, are husband and wife.

III.

That there are three children the issue of said marriage, to wit, Marie Spreckels, aged ten years, Adolph Spreckels, aged seven years, and John D. Spreckels, III, aged three years. That said children are now living and residing with plaintiff, and are under her care, custody and control, and plaintiff is a proper person to have the charge, custody and control of said children.

IV.

That there is no community property of plaintiff and defendant.

V.

That defendant has wrongfully inflicted, and now inflicts, upon plaintiff, grevious mental suffering, resulting in grevious bodily injury, in the manner following, to wit:

That for the period of several years immediately preceding the commencement of this action, de-

fendant habitually made to plaintiff such remarks as were most calculated to wound, and did wound, plaintiff's feelings; that during said period defendant adopted towards plaintiff a quarrelsome attitude and habitually found fault with plaintiff and quarreled with plaintiff without any cause or justification; that during said period defendant habitually absented himself from plaintiff, and from their home, for periods varying from two days to two weeks, without notice [50] or explanation to plaintiff; that during said period defendant wrongfully adopted, and does now adopt, a course of so acting and speaking towards and to plaintiff, and of and concerning her friends, as to greatly humiliate plaintiff and cause her grevious mental pain and suffering; that, without any cause or provocation on her part, defendant adopted a course of nagging and unwarrantably and unjustly criticising plaintiff in the presence and hearing of third persons, whereby plaintiff has been grieved and humiliated; that, without just cause or provocation on her part, defendant has, for a long time past, treated plaintiff with studied indifference and disrespect; that said acts and conduct, on the part of said defendant, have inflicted upon plaintiff grevious mental suffering, as a result of which plaintiff's health has been undermined and impaired, and she has suffered, and will continue to suffer, bodily injury as a result thereof.

VI.

That defendant is in receipt of an income sufficient to pay any reasonable sum as alimony, coun-

sel fees and costs, and any reasonable sum for the maintenance, care and education of said children.

Wherefore, plaintiff prays judgment that the bonds of matrimony between plaintiff and defendant be dissolved and that an interlocutory decree be entered herein, declaring that plaintiff is entitled to a divorce upon grounds of defendant's extreme cruelty, and is entitled to the custody of said children and to alimony, counsel fees and costs therein to be fixed and specified, and to a reasonable sum, to be in said decree fixed and specified, for the maintenance, care and education of said children.

JOS. T. O'CONNOR,
Attorney for Plaintiff.

State of California,
City and County of San Francisco,—ss.

Edith Marie Spreckels, being duly sworn, deposes and says: That she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof, and the same is true of her own knowledge except as to matters therein stated on information or belief, and, as to those matters, that she believes it to be true.

EDITH MARIE SPRECKELS.

Subscribed and sworn to before me this 5th day of December, 1913.

MATTHEW BRADY,
Notary Public in and for the City and County of San Francisco, State of California.

Filed December 5, 1913. H. I. Mulcrevy, Clerk. [51]

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 53,221.

EDITH MARIE SPRECKELS,

Plaintiff,

vs.

JOHN D. SPRECKELS, Jr.,

Defendant.

Answer.

Comes now the defendant and answering the complaint of the plaintiff admits and denies as follows:

I.

Admits the facts alleged in paragraph I thereof.

II.

Admits the facts alleged in paragraph II thereof.

III.

Admits the facts alleged in paragraph III thereof.

IV.

Admits the facts alleged in paragraph IV thereof.

V.

Denies that he has wrongfully inflicted or now inflicts upon plaintiff grevious mental suffering, resulting in grevious bodily injury in the manner alleged, or otherwise, or at all.

Denies that for the period of several years immediately preceding the commencement of this

action he habitually made to plaintiff such remarks as were most calculated to wound, or which did wound, plaintiff's feelings; denies that during said period defendant adopted towards plaintiff a quarrelsome attitude, habitually found fault with plaintiff, or quarreled with plaintiff without any cause or justification; denies that during said period defendant habitually absented himself from plaintiff, or from their home, for periods varying from two days to two weeks, without notice or explanation to plaintiff; denies that during said period defendant wrongfully adopted, or does now adopt, a cause of so acting and speaking towards and to plaintiff and of and concerning her friends as to greatly humiliate plaintiff or cause her grievous mental pain or suffering; denies that without any cause or provocation on plaintiff's part defendant adopted a course of nagging or unwarrantably or unjustly criticising plaintiff in the presence or hearing of other persons, whereby plaintiff has been grieved or humiliated; denies that without just cause or provocation on plaintiff's part he has for a long time past treated plaintiff with studied indifference or disrespect; denies that said acts and conduct, or said acts or [52] conduct, on his part have inflicted upon plaintiff grevious mental suffering, as a result of which plaintiff's health has been undermined or impaired, or that plaintiff has suffered, or will continue to suffer bodily injury as a result thereof.

VI.

Admits the facts alleged in paragraph VI of said complaint.

Wherefore, defendant prays that plaintiff take nothing by her said complaint, and that he be hence dismissed with his costs.

SAMUEL M. SHORTRIDGE,
Attorney for Defendant.

State of California,
City and County of San Francisco,—ss.

John D. Spreckels, Jr., being duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

JOHN D. SPRECKELS, Jr.

Subscribed and sworn to before me this 17th day of December, A. D. 1913.

[Seal] CHARLES FRANCEL,
Notary Public in and for the City and County of San Francisco, State of California.

Filed December 22, 1913. H. I. Mulcrevy, Clerk. [53]

In the Superior Court of the City and County of San Francisco, State of California.

No. 53,221—Dept. No. 10.

EDITH MARIE SPRECKELS,

Plaintiff,

vs.

JOHN D. SPRECKELS, Jr.,

Defendant.

Interlocutory Decree of Divorce.

This cause came on regularly for trial this 22d day of August, 1914, upon the plaintiff's complaint herein and upon the answer of defendants thereto, the plaintiff appearing by Joseph T. O'Connor, Esq., her attorney, and the defendant appearing by Samuel M. Shortridge, Esq., his attorney, and upon the proofs taken therein, from which it appears and the Court finds that all of the allegations of the complaint are true and that they are sustained by testimony free from all legal exceptions as to its competency, admissibility and sufficiency, and that all the allegations of the answer are untrue; and all and singular the law and the premises being by the Court understood and fully considered:

It is hereby ordered, adjudged and decreed as and for an interlocutory decree herein, that plaintiff is entitled to an interlocutory decree of this Court, adjudging that she has established grounds for the dissolution of the bonds of matrimony

heretofore and now existing between plaintiff and defendant; and subject to the provisions of the statute in such cases made and provided and in pursuance thereof such interlocutory decree is hereby made on the grounds of defendant's extreme cruelty and that upon the expiration of one year from the entry of this decree, final judgment granting such decree and restoring said parties to the status of single persons be entered herein.

It is further ordered, adjudged and decreed that the custody of the children of plaintiff and defendant, to wit: Marie Spreckels, Adolph Spreckels and John D. Spreckels, III be and the same is hereby awarded to plaintiff. That the defendant pay to plaintiff for her support during her life the sum of ten (10) dollars per month; that defendant pay to plaintiff for the maintenance of each of said children the sum of one hundred (100) dollars per month during the minority of said children and pay to plaintiff as attorney's fees herein the sum of fifteen hundred dollars.

Done in open court this 22d day of August, 1914.

THOS. F. GRAHAM,

Judge of said Superior Court.

Recorded Book 75, page 127, August 24, 1914.

Filed August 22, 1914. H. I. Mulcrevy, Clerk.

[54]

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 53,221—Dept. 10.

EDITH MARIE SPRECKELS,

Plaintiff,

vs.

JOHN D. SPRECKELS, Jr.,

Defendant.

Final Decree of Divorce.

This cause came on regularly to be heard on the 22d day of August, 1914, at which time, upon the plaintiff's complaint herein and upon the answer of defendant thereto, it was proven to the satisfaction of the Court, and the Court found that all of the allegations of the said complaint were true, and that they were sustained by testimony free from all legal exceptions as to its competency, admissibility and sufficiency, and that all of the allegations of said answer were untrue, and all and singular the law and the premises being by the Court understood and finally considered, and the Court also found that plaintiff was entitled to an interlocutory decree of divorce, and the Court thereupon made and entered herein its interlocutory judgment by which, among other things, it was ordered, adjudged and decreed that plaintiff herein was entitled to a decree of divorce from said defendant, and to have the bonds of

matrimony theretofore existing between the plaintiff and the defendant dissolved.

And more than one year having expired since the date of the entry of said interlocutory judgment, to wit, August 24, 1914, and no appeal having been taken from such judgment or at all, and said judgment being now and at all times since the entry thereof in full force and effect.

Now, therefore, on motion of plaintiff, it is ordered, adjudged and decreed that plaintiff shall have, and is hereby granted a divorce from said defendant, and that the bonds of matrimony between said plaintiff and said defendant are hereby dissolved and the said parties and each of them are hereby restored to the status of single, unmarried person.

It is further ordered, adjudged and decreed that this judgment shall not affect, or be construed to effect, an existing agreement by and between the parties to this action, made and entered into by them on the 1st day of December, 1913, and by consent of the parties hereto the Court hereby reserves the right to hereafter determine all matters in regard to the existing rights of the parties hereto.

Dated: August 25th, 1915.

THOS. F. GRAHAM,
Judge of the Superior Court.

Recorded Book 84, page 231. August 25, 1915.

Filed August 25, 1915. H. I. Mulcrevy, Clerk.

[55]

(Testimony of Edith Huntington Wakefield.)

Mr. SCHLESINGER.—That is the case for the defendant. (Tr. p. 11.)

The COURT.—Who drew this contract?

Mr. SCHLESINGER.—It was drawn, if your Honor please, I presume, by Mr. Shortridge and by Mr. O'Connor, acting together.

The COURT.—And Mr. Shortridge does not appear in the case now, does he?

Mr. SCHLESINGER.—No, he does not. He is away on his senatorial campaign.

The COURT.—But has he ever appeared in this case?

Mr. SCHLESINGER.—Oh, yes. This is the first time that I have appeared in the case, your Honor, to represent Mr. Shortridge.

The COURT.—And did he raise that point in the answer?

Mr. SCHLESINGER.—He simply raised the point by way of a general denial of anything being due under the contract. If your Honor should find that the contract is against public policy you should not enforce it, even in the absence of the point being made, but I take it that it is sufficiently made in the pleadings.

The COURT.—I certainly would not hold it invalid unless I was, under the law, compelled to, because I think that if Mr. Shortridge drew the contract, knowing the law, as he does, he would not intentionally have drawn a contract that was contrary to public policy and against good morals and

(Testimony of Edith Huntington Wakefield.)

then insist upon enforcing that defense as a defense to this action. (Tr. p. 15.)

The COURT.—It seems to be the very fact that there was a nominal amount provided for in the decree is evidence of the fact that both parties had in mind the execution of this contract and the provisions of it, and that they proceeded upon the idea that it was valid, and undoubtedly, to my mind, at that time intended that it should be carried out.

Mr. SCHLESINGER.—Your Honor, that would so appear but the [56] fact is that under the laws of this state, unless there was a certain amount specified in the interlocutory decree, that decree cannot be modified. In other words, if the decree had mentioned no amount at all in favor of Mrs. Spreckels, at no subsequent time could she have had alimony allowed her. I think the purpose of putting in that decree the sum of $10 per month was to permit the parties to come into that tribunal and have it subsequently modified if the circumstances and facts warranted that kind of an application. (Tr. pp. 18, 19.)

Mr. PECK.—Q. Where were you and Mr. Spreckels living at the time of the making of the contract of December 1, 1913?

Mr. SCHLESINGER.—The contract shows that it was made in San Francisco.

Mr. PECK.—Q. I say, where were you living at that time? A. On Washington Street.

(Testimony of Edith Huntington Wakefield.)

Q. Was Mr. Spreckels living with you at that time?

A. No, he was living out on Stanyan Street.

Q. How long before that time had you and Mr. Spreckels lived apart? A. About a year.

Q. You had separated, had you, for about a year before that contract was entered into? A. Yes.

Mr. SCHLESINGER.—That is objected to as immaterial, irrelevant and incompetent, and not within the issues involved here.

The COURT.—The objection is overruled.

Mr. SCHLESINGER.—Exception. (Tr. p. 38.)

On cross-examination the witness testified as follows:

"I did not make any bill of sale to Mr. Spreckels of any portion of the library or furnishings or books. [57]

"I read the complaint in the divorce case in which I appeared as plaintiff and John D. Spreckels, Jr., appeared as defendant, before I signed it.

Q. I will invite your attention to this averment of the complaint appearing at line 32: 'That there is no community property of plaintiff and defendant.' Do you recall that paragraph in the complaint at the time you signed it?

A. I could not recall the time I signed it.

Q. But you had read the complaint at the time you signed it. Was it read over to you by your counsel, Mr. Joseph T. O'Connor? A. Yes, sir.

(Testimony of John D. Spreckels, Jr.)

Q. Was it explained to you by him.

A. I just read it.

Mr. SCHLESINGER. — I will state, if your Honor please, that it is verified by Mrs. Wakefield, then Mrs. Spreckels.

Testimony of John D. Spreckels, Jr., for Defendant.

JOHN D. SPRECKELS, Jr., called as a witness for the defendant, being duly sworn, testified as follows:

I am the defendant in this action.

Q. Mr. Spreckels, there has been some testimony here as to household furniture; that furniture is referred to as furniture in the present home of the parties hereto, situated at No. 1232 Washington Street, in said city and county; was that the family home at the time the contract was signed, 1232 Washington Street?

A. No, the family home was 2099 Pacific Avenue.

The WITNESS. — (Continuing.) At the time the contract was [58] signed Mrs. Wakefield was living at 1232 Washington street, although I lived there with her for a while. The furniture belonged to me, as far as I know. I have not the furniture, and do not know where it is.

Since the divorce Mrs. Wakefield had the custody of the children, but I have always had the actual custody. They have been residing at 2099 Pacific Avenue, and then they have been going to school. I have been paying for their maintenance and support up to the last year, when I have been

(Testimony of John D. Spreckels, Jr.)

away. I have paid to Mrs. Wakefield the amounts of money called for by the interlocutory decree. (Tr. pp. 46, 47.)

On cross-examination, the witness testified as follows:

I don't remember when I made the last payment to Mrs. Spreckels, but I would not deny the allegation in the complaint. I did not pay her anything last month, nor the month before. I do not recollect that I paid her since April 15, 1915. What I meant when I answered counsel a moment ago that I paid her the $10 a month mentioned in the interlocutory decree, if the total amounts paid to her were figured up, I think you would find that in place of paying it regularly every month—if that is the way my answer was to be construed it was wrong. I have not paid the money every month, I might have paid it in bunches of three or four months at a time—I don't know. The agreement called for $350 a month. I have no recollection of the exact amount I paid out. I know I paid out more money than I had to pay out. I think that up to the 15th of April, 1915, I paid more than a sufficient sum of money to make $350 a month from the time the agreement was entered into up to that time. I do not recall any sum paid by me since April 15, 1915. I have no memory of it. [59]

Mrs. Wakefield asked me for permission to take one of the boys to Tahiti with her; I gave her permission to do so. I have no recollection of contributing anything toward his support or mainte-

(Testimony of John D. Spreckels, Jr.)

nance during that time. I do not know how he was maintained. I contributed nothing toward it.

With regard to the other children, I have been away for over a year, and during the time I was absent I know how the children were maintained. I made certain arrangements that my father was to look after the children.

I certainly remember contributing toward the support and maintenance of my children since the contract of December 1, 1913. I paid for the schooling, at Potter's School, first and, I have forgotten the names of the schools; I paid for the tuition. I don't remember the amount I paid for tuition. The cost and maintenance has been well over $100 a month for each child. They were there over a year, I think. The children always have been in my care and custody and I have looked after them and maintained them. I have no recollection as to the exact moneys paid, or the dates. I don't remember whether the children were in the Potter School when this contract was made.

Q. Did you ever make any other contribution for them than the payment of the tuition at that school?

Mr. SCHLESINGER.—Your Honor, may it be understood that I object to this on the ground that it is not proper cross-examination, that there is no issue as to whether or not they were properly maintained, and, therefore, it is not proper cross-examination.

(Testimony of John D. Spreckels, Jr.)

The COURT.—Yes.

Mr. SCHLESINGER.—Exception.

A. Yes.

WITNESS. — (Continuing.) I don't remember when and where and [60] under what circumstances. I said that I had maintained those children and supported them ever since the divorce.

Q. What did you do toward their maintenance last month?

Mr. SCHLESINGER.—I object to that as not being proper cross-examination.

The COURT.—The objection is overruled.

Mr. SCHLESINGER.—Exception.

A. I have had the two boys living with me up to a recent time. I have sent them to a dentist, I bought them clothes. I don't remember whether it was the 25th of last month, or about that time, when they came to me. I think I arrived here about the 25th of June.

Mr. SCHLESINGER.—One moment: I object to that as not proper cross-examination.

The COURT.—The objection is overruled.

WITNESS.—(Continuing.) Prior to that month for about a year I was away. So far as I, myself, know, I don't know whether the funds were taken from moneys I might have had on hand, or whether they were put up by my father, or whether they have been subsequently charged to me, or not. I know that the children have been supported and maintained by either me or by my father. In the last year principally by my father.

(Testimony of John D. Spreckels, Jr.)

Q. Well, take it two years ago: Who maintained and supported them then? Your father?

Mr. SCHLESINGER.—I object to that as not being proper cross-examination.

The COURT.—Objection overruled.

A. I supported them.

Q. In the same way that you supported them during the last year? A. Not the same way. [61]

WITNESS.—(Continuing.) So far as I know the furniture belonged to me. It was purchased after our marriage. I don't remember where the money came from which purchased it.

Mr. SCHLESINGER.—If your Honor please, there is some question about the practice in respect to motions for judgment. In order to preserve our points, I would like now to move for a judgment of nonsuit in favor of the defendant, upon the following grounds:

1. On the general ground of the insufficiency of the evidence.

2. That the contract of December 1, 1913, is wholly void as being against public policy, and it being contingent upon and in aid of obtaining a divorce.

3. Upon the ground that the contract upon which this suit is based is merged into and superseded by the interlocutory decree of divorce, which contains a provision for alimony.

4. That the interlocutory decree in the divorce case is *res adjudicata* as to the question of alimony.

The COURT.—The motion is denied.

Mr. SCHLESINGER.—We will note an exception. (Tr. pp. 66–67.) [62]

The foregoing bill of exceptions contains all the evidence or a statement of the agreed substance of the evidence that was adduced and all the proceedings that were had on the trial of the above-entitled action and is true and correct, and is hereby approved; and,

IT IS FURTHER STIPULATED that said bill of exceptions may be allowed, settled and approved by a Judge outside of the State and District in which said action was tried with the same force and effect as though the same was settled, allowed and approved by a Judge within the aforesaid State and District.

Dated: December 15th, 1921.

C. W. BYRNE, and
JAMES F. PECK,
Attorneys for Plaintiff.

SAMUEL M. SHORTRIDGE,
MORRISON, DUNNE & BROBECK,
BERT SCHLESINGER,
Attorneys for Defendant.

Order Allowing Bill of Exceptions and Making the Same Part of the Records.

The foregoing bill of exceptions having been duly presented to the Court and having been amended to correspond to the facts,

IT IS HEREBY signed, settled, allowed and ap-

proved and made a part of the records in this cause.

Dated: December 30, 1921.

WM. H. SAWTELLE,
Judge.

[Endorsed]: Filed Dec. 23, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [63]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,077.

EDITH H. WAKEFIELD,
Plaintiff,

vs.

JOHN D. SPRECKELS, Special Administrator of the Estate of John D. Spreckels, Jr. Deceased,
Defendant.

Petition for Writ of Error.

Now comes John D. Spreckels, special administrator of the estate of John D. Spreckels, Jr., deceased, substituted as defendant in the above-entitled action in lieu of John D. Spreckels, Jr., deceased, and brings this his petition for writ of error to the Southern Division of the District Court of the United States, for the Northern District of California, and in that behalf petitioner shows:

On the 18th day of June, 1921, there was made, rendered and entered in the above-entitled court and cause a judgment in favor of said plaintiff and against John D. Spreckels, Jr., the original defendant in said action, now deceased, for the sum of $11,413.52, and interest at 7% per annum, and;

The Court further ordered, adjudged and decreed that the contract mentioned in paragraph IV of plaintiff's amended complaint was not merged or superseded by the interlocutory or final decree of divorce alleged in defendant's answer, and the said contract is in [64] full force as a subsisting and binding agreement and is not void or invalid or in contravention of public policy.

And your petitioner shows that he is advised by counsel and he avers that there was and is manifest error in the records and proceedings had in said cause, and in the making, rendition and entry of said judgment, to the great injury and damage of your petitioner, all of which errors will be more fully made to appear by an examination of the said record and by an examination of the bill of exceptions to be tendered and filed and in the assignments of errors presented herewith; and to that end thereafter that the said judgment and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner now prays that a writ of error may be issued, directed therefrom to said Southern Division of the District Court of the United States for the Northern District of California, returnable according to law and the practice of the court, and

that there may be directed to be returned pursuant thereto a true copy of the record, Bill of Exceptions, Assignment of Errors, and all proceedings had in said cause, that the same may be removed unto the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the errors, if any have happened may be duly corrected, and full and speedy justice done to your petitioner.

Dated: December 13th, 1921,

SAMUEL M. SHORTRIDGE,
MORRISON, DUNNE & BROBECK,
BERT SCHLESINGER,
Attorneys for Petitioner.

[Endorsed]: Filed Dec. 14, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [65]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,077.

EDITH H. WAKEFIELD,
Plaintiff,

vs.

JOHN D. SPRECKELS, Special Admisistrator of the Estate of JOHN D. SPRECKELS, Jr., Deceased,
Defendant.

Assignment of Errors.

John D. Spreckels, special administrator of

the estate of John D. Spreckels, Jr., deceased, and plaintiff in error herein, having petitioned for an order from said court permitting him to procure a writ of error to this court directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment made and entered in said cause in favor of said plaintiff and against John D. Spreckels, Jr., now deceased, now makes and files with said petition the following assignment of errors herein upon which he will rely for a reversal of said judgment upon the said writ, and which errors and each and every of them are to the great detriment, injury and prejudice of the said plaintiff in error; and he says that in the record and proceedings in the above-entitled action, upon the hearing and determination thereof in the Southern Division of the District Court of the United States for the Northern District of California, there is manifest error in this, to wit: [66]

1. The evidence shows that the written agreement made between the plaintiff and John D. Spreckels, Jr., now deceased, dated the first day of December, 1913, and which agreement is mentioned in paragraph IV of plaintiff's amended complaint, was and is void and against public policy, in this: said agreement was made and executed between the parties thereto having for its object the dissolution of the marriage contract between them, or to facilitate that result.

2. The evidence shows the aforesaid agreement was made and entered into between the parties thereto with the purpose and object of bringing

about the dissolution of the marriage contract or facilitating that result.

3. The evidence shows it was the intention of the parties to said written agreement when they made and executed the same to promote a dissolution of the marriage relations existing between them.

4. The evidence shows that the aforesaid written agreement was based upon the promise or understanding between the parties thereto to institute an action to dissolve the marriage relations existing between them, and that such action was instituted and resulted in a decree of divorce being made and entered in favor of the plaintiff and against the said John D. Spreckels, Jr., now deceased.

5. That the written agreement made and entered into between the plaintiff Edith H. Wakefield and John D. Spreckels, Jr., deceased, on the first day of December, 1913, was and is void and against public policy.

6. That said agreement is unlawful and void in this: that it is manifest from said agreement that it was the intention of the parties thereto to promote a dissolution of the marriage [67] relations existing between them.

7. That said agreement was and is unlawful and void in that it is an agreement based upon a promise or understanding to institute an action for the dissolution of the marriage relations between the parties thereto.

8. That said agreement is one calculated or intended to facilitate the securing of a divorce, and

therefore contrary to public policy.

9. That said agreement is void and against public policy in this: that it is an agreement which incites by the hope of financial profit the separation of husband and wife.

10. That the Court erred in finding and adjudging that the plaintiff was entitled to judgment against the said John D. Spreckels, Jr., deceased, in the sum of $11,413.52, or in any other sum of money whatever.

11. The Court erred in making and entering judgment in favor of said plaintiff.

12. That the Court erred in finding and adjudging that the written agreement made between the said plaintiff and John D. Spreckels, Jr., deceased, on the first day of December, 1913, is a valid agreement and not contrary to public policy.

13. That the Court erred in finding and adjudging that the agreement mentioned in paragraph IV of plaintiff's amended complaint was not merged or superseded by the interlocutory or final decree of divorce alleged in defendant's answer, and that the said agreement is in full force as a subsisting and binding agreement and is not void or invalid or in contravention of public policy.

14. That the Court erred in denying defendant's motion [68] for a nonsuit.

Dated: December 14, 1921.

SAMUEL M. SHORTRIDGE,
MORRISON, DUNNE & BROBECK,
BERT SCHLESINGER,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed Dec. 14, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [69]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,077.

EDITH H. WAKEFIELD,

Plaintiff,

vs.

JOHN D. SPRECKELS, Special Admisistrator of the Estate of JOHN D. SPRECKELS, Jr., Deceased,

Defendant.

Order Allowing Writ of Error.

The writ of error therein prayed for by John D. Spreckels, special administrator of the estate of John D. Spreckels, Jr., deceased, pending the decision upon the writ of error is hereby allowed; and, the bond for costs upon the writ of error is hereby fixed at the sum of Five Hundred Dollars ($500.00).

Dated: December 14th, 1921.

FRANK H. RUDKIN,

District Judge of the United States for the Northern District of California.

[Endorsed]: Filed Dec. 14, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [70]

(Title of Court and Cause.)

(Admission of Service of Petition for Writ of Error, etc.)

Receipt is hereby acknowledged this 14th day of December, 1921, of copies of petition for writ of error; order allowing writ of error; assignment of errors and writ of error.

JAMES F. PECK,
CHARLES W. BYRNES,
Attorneys for Plaintiff,

[Endorsed]: Filed Dec. 14, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [71]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,077.

EDITH H. WAKEFIELD,

Plaintiff,

vs.

JOHN D. SPRECKELS, Special Admisistrator of the Estate of JOHN D. SPRECKELS, Jr., Deceased,

Defendant.

(Cost Bond.)

KNOW ALL MEN BY THESE PRESENTS: That we, John D. Spreckels, special administrator

of the estate of John D. Spreckels, Jr., deceased, defendant above named, as principal, and W. I. Brobeck and W. H. Hannam, as sureties, are held and firmly bound unto Edith H. Wakefield, the plaintiff in the above-entitled action, in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said Edith H. Wakefield, her heirs, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of December, 1921.

WHEREAS, lately at a District Court of the United States for the Southern Division of the Northern District of California, in a suit pending in said court between the said Edith H. Wakefield, as plaintiff, and John D. Spreckels, Jr., as defendant, a judgment was rendered in favor of the said plaintiff and against [72] the said defendant John D. Spreckels, Jr., and the said John D. Spreckels, Jr., having died since the rendition and entry of said judgment and the father of said decedent John D. Spreckels having been by order of the Superior Court of the State of California, for the City and County of San Francisco, in the matter of the estate of John D. Spreckels, Jr., deceased, duly appointed special administrator of the estate of said John D. Spreckels, Jr., deceased, and having duly qualified as such, and the said District Court having on the 14th day of December, 1921, made its order substituting John D. Spreckels special

administrator of the estate of John D. Spreckels, Jr., deceased, as party defendant in the above-entitled action in lieu of John D. Spreckels, Jr., deceased, and the said John D. Spreckels as such substituted defendant in the action above named having obtained from said District Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said Edith H. Wakefield citing and admonishing her to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California;

Now, the condition of the above obligation is such, that if the said John D. Spreckels, special administrator of the estate of John D. Spreckels, Jr., deceased, and the substituted defendant in the aforesaid action shall prosecute his writ of error to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN D. SPRECKELS. (Seal)
W. I. BROBECK. (Seal)
W. H. HANNAM. (Seal)

Acknowledged before me the day and year first above written.

[Seal] EUGENE P. JONES.
Notary Public in and for the City and County of San Francisco, State of California. [73]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

W. I. Brobeck and W. H. Hannam, being duly sworn, each for himself, deposes and says, that he is a freeholder in said District, and is worth the sum of Five Hundred Dollars ($500), exclusive of property exempt from execution, and over and above all debts and liabilities.

W. I. BROBECK.
W. H. HANNAM,

Subscribed and sworn to before me this 15th day of December, 1921.

[Seal] EUGENE P. JONES,
Notary Public in and for the City and County of San Francisco, State of California.

Form and sufficiency of the within bond is hereby approved this 15th day of December, 1921.

C. W. BYRNES,
JAMES F. PECK,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 15, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [74]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,077.

EDITH H. WAKEFIELD,
Plaintiff and Defendant in Error,
vs.
JOHN D. SPRECKELS, Special Admisistrator of the Estate of JOHN D. SPRECKELS, Jr., Deceased,
Defendant and Plaintiff in Error.

Praecipe for Transcript on Writ of Error.

To the Clerk of Said Court:

Sir: Please prepare certified transcript on writ of error of the following pleadings, papers and orders:

1st. Complaint and summons.
2d. Amended complaint.
3d. Demurrer to amended complaint.
4th. Order overruling demurrer to amended complaint.
5th. Stipulation extending time of defendant John D. Spreckels, Jr., now deceased, in which to answer amended complaint.
6th. Answer to amended complaint.
7th. Stipulation waiving trial by jury.
8th. Findings of fact and conclusions of law.
9th. Judgment.

10th. Order dated December 14, 1921, substituting party defendant.

11th. Admission of service of order dated December 14, 1921, substituting party defendant. [75]

12th. Bill of exceptions as settled by trial Judge.

13th. Petition for writ of error.

14th. Order allowing writ of error.

15th. Assignment of errors.

16th. Bond for costs.

17th. Writ of error.

18th. Citation on writ of error.

19th. Praecipe for certified transcript.

Dated December 31, 1921.

SAMUEL M. SHORTRIDGE,
MORRISON, DUNNE & BROBECK,
BERT SCHLESINGER,

Attorneys for John D. Spreckels, Special Administrator of the Estate of John D. Spreckels, Jr., Deceased, Defendant and Plaintiff in Error.

[Endorsed]: Filed Jan. 3, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [76]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,077.

EDITH H. WAKEFIELD,

Plaintiff,

vs.

JOHN D. SPRECKELS, Special Administrator of the Estate of JOHN D. SPRECKELS, Jr.,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing seventy-six (76) pages, numbered from 1 to 76, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on writ of error, in the above-entitled cause, as the same remains of record and on file in the office of the Clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $34.85; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 26th day of January, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk. [77]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,077.

EDITH H. WAKEFIELD,
Plaintiff and Defendant in Error,

vs.

JOHN D. SPRECKELS, Special Administrator of the Estate of JOHN D. SPRECKELS, Jr., Deceased,
Defendant and Plaintiff in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you,

between John D. Spreckels, special administrator of the estate of John D. Spreckels, Jr., deceased. plaintiff in error, and Edith H. Wakefield, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court [78] of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WM. HOWARD TAFT, Chief Justice of the United States, the 14th day of December, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

J. A. Schaertzer,
Deputy Clerk.

Allowed by:

FRANK H. RUDKIN,
Judge.

Dated December 14th, 1921. [79]

[Endorsed]: No. 16,077. Southern Division District Court of the United States, Northern District of California, Second Division. Edith H. Wakefield, Plaintiff, and Defendant in Error, vs. John D. Spreckels, Special Administrator of the Estate of John D. Spreckels, Jr., Deceased, Defendant, and Plaintiff in Error. Writ of Error. Filed Dec. 14, 1921. W. B. Maling, Clerk. J. A. Schaertzer, Deputy Clerk.

Receipt of a copy of the within writ of error is admitted this 14th day of December, 1921.

_____,

_____,

Attorneys for Plaintiff and Defendant in Error.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,

Clerk United States District Court for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk. [80]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,077.

EDITH H. WAKEFIELD,

Plaintiff,

vs.

JOHN D. SPRECKELS, Special Administrator of the Estate of JOHN D. SPRECKELS, Jr., Deceased,

Defendant.

Citation on Writ of Error.

United States of America,
Northern District of California,—ss.

To Edith H. Wakefield, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's office at the United States District Court for the

Northern District of California, wherein John D. Spreckels, special administrator of the estate of John D. Spreckels, Jr., deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf. [81]

WITNESS, the Honorable WM. C. VAN FLEET, Judge of the United States District Court, for the Northern District of California, this 14th day of December, 1921.

FRANK H. RUDKIN,
United States District Judge. [82]

[Endorsed]: No. 16,077. Southern Division of the District Court of the United States, Northern District of California, Second Division. Edith H. Wakefield, Plaintiff, vs. John D. Spreckels, Special Administrator of the Estate of John D. Spreckels, Jr., Deceased, Defendant. Citation on Writ of Error. Filed Dec. 14, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Receipt of a copy of the within citation on writ of error is admitted this 14th day of December, 1921.

JAMES F. PECK,
CHARLES W. BYRNES,
Attorneys for Plaintiff

[Endorsed]: No. 3832. United States Circuit Court of Appeals for the Ninth Circuit. John D. Spreckels as Special Administrator of the Estate of John D. Spreckels, Jr., Deceased, Plaintiff in Error, vs. Edith H. Wakefield, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed Jan. 26, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the Southern Division of the Northern District of California, Second Division.

No. 16,077.

EDITH H. WAKEFIELD,

Plaintiff,

vs.

JOHN D. SPRECKELS,

Defendant.

Order Enlarging Return Day of Writ of Error and Citation.

IT IS ORDERED that the return day of the writ of error and return day of the citation issued in the above-entitled cause be enlarged, and the same is

hereby enlarged, thirty (30) days from and after the date hereof in order to permit the clerk of the above-named court to complete certified copy of transcript on the writ of error herein, to be transmitted by him to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 7, 1922.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 16,077. District Court of the United States for the Southern Division of the Northern District of California, Second Division. Edith H. Wakefield, Plaintiff, vs. John D. Spreckels, Jr., Defendant. Order Enlarging Return Day of Writ of Error and Citation.

No. 3832. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 7, 1922. F. D. Monckton, Clerk. Re-filed Jan. 26, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 3832

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN D. SPRECKELS, as special administrator of the estate of John D. Spreckels, Jr., deceased,

Plaintiff in Error,

vs.

EDITH H. WAKEFIELD,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

SAMUEL M. SHORTRIDGE,
MORRISON, DUNNE & BROBECK,
BERT SCHLESINGER,
Counsel for Plaintiff in Error.

FILED
MAY 8 - 1922
F. D. MONCKTON,
CLERK.

No. 3832

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN D. SPRECKELS, as special administrator of the estate of John D. Spreckels, Jr., deceased,

Plaintiff in Error,

vs.

EDITH H. WAKEFIELD,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This writ of error presents but a single question of law; namely, whether or not the agreement upon which the present action is based, is contrary to public policy and void.

Statement of Facts.

On December 1, 1913, John D. Spreckels, Jr., and the defendant in error herein, who were then husband and wife, entered into an agreement wherein the promises and covenants on the part of Mr. Spreckels to do certain things and to make certain

payments of money to the defendant in error, were contingent upon her procuring a divorce. This agreement contains, among other things, the following clauses:

> "That whereas, *the party of the second part is about to commence a suit for divorce against the party of the first part* and has employed Mr. Joseph T. O'Connor as her counsel for that purpose, and the party of the first part has employed Mr. Samuel M. Shortridge to represent him in the said suit; and,
> * * * * * * *
>
> 1. That *upon the due making and entry of an interlocutory decree of divorce* in favor of the said second party the said first party will pay unto the said second party the sum of three hundred and fifty ($350.00) dollars, monthly, in advance, commencing with the date of the entry of said interlocutory decree, for the period of one year thereafter; that upon the *due making and entry of a final decree of divorce* in favor of the said second party, said first party will pay unto the said second party, monthly, in advance, the sum of three hundred and fifty ($350.) dollars during the remaining period of her natural life. (Italics ours.)
>
> 2. That the said second party agrees to accept said several sums of three hundred and fifty ($350) dollars, monthly, in advance, as and for and in full of her right or claim to *temporary and permanent alimony, maintenance and support from the said first party.*" (Italics ours.)
>
> (Tr. p. 3.)

The present action is brought by the defendant in error to recover deferred payments amounting to $10,300 which she alleges is due her under the above provisions of the agreement in question.

Immediately following the making of this agreement; to-wit, on December 5, 1913, the defendant in error commenced an action for divorce in the Superior Court of the State of California, in and for the City and County of San Francisco, in which she charged her husband with extreme cruelty; the charges in this respect, however, being very general.

On December 17, 1913, an answer was filed denying the material allegations of the complaint; and, subsequently, on August 22, 1914, an interlocutory decree of divorce was rendered.

On August 25, 1915, a final decree of divorce was entered. Since the making of this decree the defendant in error remarried.

Argument.

ANY AGREEMENT CONDITIONED UPON THE OBTAINMENT OF A DIVORCE, OR INTENDED OR CALCULATED TO FACILITATE ITS ENFORCEMENT, IS VOID.

It will be observed that the obligation upon the part of Mr. Spreckels to pay the monthly installments, is made wholly dependent upon the granting of a decree of divorce. The agreement contains a further clause that its provisions "shall not be modified or abrogated by any interlocutory decree or final decree of divorce in favor of the said second party which may be hereafter made and entered" (Tr. p. 6).

It therefore appears that the purpose of the agreement was to control the dissolution of the marriage and the terms of dissolution as to all matters involved, including alimony, without regard to the tribunal before which the case should be heard.

The finding of the District Court to the effect that the purpose of the contract was not to bring about a dissolution of the marriage relation, or to put an end to the marriage relation, or to facilitate procuring a divorce, and that such contract did not influence or tend to influence the plaintiff in procuring a divorce, and was not so intended (Tr. p. 32) is clearly against the intent of the plain and unambiguous terms of the agreement. It is our contention that the agreement itself is against public policy, and that the intention of the parties can only be ascertained from the terms of the instrument itself, and if this instrument is to be judged in the light of the well-settled law of the land, it follows as a conclusion of law that it is void as against public policy and good morals.

In the case of Newman v. Freitas, 129 Cal. 289, the Supreme Court of California, said:

> "But there is an objection to the enforcement of the contract more radical than the one just considered. The contract is, in its nature, against the policy of the law and contrary to good morals. The law does not favor divorce, and permits it only for approved causes and on sentence from duly established public authority. Therefore, any agreement for divorce, *or any collateral bargaining promotive of it,* is consid-

ered unlawful and void. (2 Bishop on Marriage, Divorce and Separation, sec. 696; Greenwood on Public Policy, 490.) Under our code either husband or wife may enter into any agreement or transaction with the other, or with any other person, respecting property, which either might if unmarried. (Civ. Code, sec. 158.) Notwithstanding this freedom to enter into any contract between themselves or with other persons, it has been held in this state repeatedly that an agreement between husband and wife founded upon consideration to withdraw or abandon a defense to a suit for divorce, or do anything to facilitate procuring the same, is illegal and void. (Beard v. Beard, 65 Cal. 354; Senter v. Senter, 70 Cal. 619; Loveren v. Loveren, 106 Cal. 509.) In the latter case the following from Phillips v. Thorp, 10 Or. 494, is quoted with approval: 'The authorities are uniform in holding that any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, such as an agreement by the defendant in a pending action for divorce to withdraw his or her opposition, to make no defense, is void as *contra bonos mores'*. The courts of other states have expressed themselves similarly in reference to such contracts. In Hamilton v. Hamilton, 89 Ill. 349, it is said: 'The majority of the court, however, are of the opinion that the contract set out in the declaration is in its essence and character against public policy and it must be held invalid upon that ground. While divorces are authorized by law, they ought not to be encouraged. In this contract *there is no express agreement that the husband would not resist the application for a divorce, or that he would consent to a divorce,* still it is thought that to permit such a contract as this to be enforced in the courts would *open the door for the attainment of divorces by collusion,* and upon

this ground the decision of the court in sustaining the demurrer to the declaration ought to be sustained'.

In *Muckenburg v. Holler,* 29 Ind. 139, the court say: 'The special contract for the payment of two hundred dollars was contrary to the policy of the law. It was so framed as to have effect *only on condition that a divorce should be granted. Its direct tendency was to influence the present plaintiff in procuring a divorce or in overcoming resistance to an effort by his wife directed to that end.* The marriage relation is not thus to be tampered with, and the courts, by contracts of the parties, converted into mere registers of their agreement for separation from the bonds of matrimony. The law favors marriage, and cannot, therefore, sanction contracts intended to promote its dissolution by lending itself to their enforcements. We know of no case in the books in which such an appeal to any court to compel the fulfillment of such a contract or to award damages for its breach has been successfully made'.

In *Schmieding v. Doellner,* 10 Mo. App. 373, it is said: 'That any agreement entered into between husband and wife pending a suit for divorce, or in contemplation of such a suit, whose force and effect are in any way *made dependent upon the result of the suit,* will be held void because of the motive or inducement which it offers for either a passive consent or active aid in promoting the consummation of a divorce. *There may be no direct evidence of collusion for that specific purpose. It is sufficient to vitiate the agreement if it be so framed that in order to an enjoyment of its benefits by one party or the other a decree must supervene.*"

In Loveren v. Loveren, 106 Cal. 510, the court said:

> "The instrument in question was clearly against public policy and void. (Beard v. Beard, 65 Cal. 354; 2 Bishop on Marriage and Divorce, 702, 885; Greenwood on Public Policy, 490, 491.) In *Phillips v. Thorp,* 10 Or. 494, the subject is fully considered and many authorities cited; and the courts say, quoting from another case, that 'The authorities are uniform in holding that any contract between the parties having for its object the dissolution of the marriage contract, or *facilitating that result,* such as an agreement by the defendant in a pending action for divorce to withdraw his or her opposition and to make no defense, is void as contra bonos mores; and that courts will esteem it their duty to interfere, *upon their own motion,* whenever it appears the dissolution is sought to be effected by the connivance or collusion of the parties.'
>
> Appellant contends that the court had no jurisdiction in this action to set aside the said written instrument, and that an independent action should have been brought for that purpose. But the court clearly had jurisdiction to make disposition of the community property (Civ. Code, secs. 146, 147); and, when appellant insisted upon said instrument as providing how said property should be divided, the court necessarily had jurisdiction to consider it, and to disregard it if found to be void. Indeed, appellant asked for findings upon the subject of said instrument, thus acknowledging the jurisdiction. Whenever a void contract is relied on, *no matter what the form of the action is in which it is presented, a court will disregard it.* Speck v. Dansmann, 7 Mo. App. 165 (quoted in Greenwood on Public Policy, 490, 491), the court say: 'Such pretended agreements, if they are to have any force, *must be subjected to the examination*

of the divorce court, and derive their sanction *from a decree made by the court* with a knowledge of the facts.' "

In Beard v. Beard, 65 Cal. 356, in speaking of a similar transaction, the court decided that the plaintiff must content herself with so much of the benefit of the void contract as she had already secured unchallenged.

In Birch v. Anthony, 77 Am. St. Reports 380 (Ga.), the court said:

> "Whatever else may have been contemplated by the parties to this contract, *it manifestly appears that it was their intention to promote a dissolution of the marriage relation existing between them.* By reference to the contract, it will be seen that it was apparently complete and ready to be signed when the condition was added providing, in effect, that it should be legal if a divorce should be granted to the husband on or before a fixed date. *This provision renders the whole contract illegal, as it is well settled that a contract intended to promote a dissolution of marriage is contrary to the policy of the law, illegal and void:* 2 Am. & Eng. Ency. of Law, 2d ed., 127; 9 Am. & Eng. Ency. of Law, 1st ed., 920; 1 Bishop on Marriage and Divorce, sec. 76; 2 Bishop on Marriage and Divorce, sec. 696; Adams v. Adams, 25 Minn. 72; Weeks v. Hill, 38 N. H. 199; Everhart v. Puckett, 73 Ind. 409; Sayles v. Sayles, 21 N. H. 312; Goodwin v. Goodwin, 4 Day, 343; Cross v. Cross, 58 N. H. 373; Muckenburg v. Holler, 29 Ind. 139; 92 Am. Dec. 345; Hamilton v. Hamilton, 89 Ill. 349; Phillips v. Thorp, 10 Or. 494. In Sayles v. Sayles, 21 N. H. 312, 53 Am. Dec. 208, Wood, J., said: 'The object of the agreement was to bring about a dissolution of the marriage contract, and

to put an end to the various duties and relations resulting from it. *Any contract having such purpose, object and tendency, cannot be, in law, sustained, but must be regarded as being against sound public policy, and consequently illegal and void.'* " (Italics ours.)

To the same effect are the following cases:

Teachout v. Bogy, 175 Cal. 484;
Sayles v. Sayles, 21 N. H. 312;
Barngrove v. Pettigrew, 128 Iowa 523;
Davis v. Hinman, 103 N. W. 668;
Muckenburg v. Holler, 29 Ind. 139;
Kissler v. Kissler, 141 Wis. 491;
Delbridge v. Beach, 66 Wash. 416;
McDonald v. McDonald, 125 Mo. App. 513;
Adams v. Adams, 25 Minn. 77;
Emerson v. Emerson, 120 Md. 584.

The last word of the California courts upon this subject is to be found in the case of McCahan v. McCahan, 31 Cal. App. Dec. 1106 (advance sheet, April 20, 1920), in which the District Court of Appeal said:

"In the event that any action for divorce shall ever be instituted between the parties hereto, then and in such event it is agreed that there shall be awarded to the party of the second part the sum of one hundred dollars in full settlement of all her claims for counsel fees and costs herein; and it is further agreed that said sum shall be awarded in one action only.

Under our code either husband or wife may enter into any agreement or transaction with the other respecting property which either might if unmarried. (Civ. Code, sec. 158.) Notwith-

> standing this freedom to so contract, it has been repeatedly held in this state that an agreement between husband and wife to do anything to facilitate procuring a divorce is illegal and void. (Newman v. Freitas, 129 Cal. 283.) (1) We think it requires no lengthy discussion to point out the circumstances under which an agreement in advance and in anticipation of a divorce action being brought, to pay the counsel fees and costs, may operate to facilitate a dissolution of the marriage tie. Such being its effect it is void as contra bonos mores. (Pereira v. Pereira, 156 Cal. 1, 5.)"

In Johnson v. Johnson, 233 Fed. 761 (9th Circuit), the court said:

> "It was decided April 6, 1914: First, that the agreement entered into between Mr. and Mrs. Johnson immediately prior to the divorce, in which he promised to pay her $3000, and also $75 a month additional, pending the payment of the principal sum, was null and void, because it was made in contemplation of and to facilitate the divorce."

These cases distinctly decide that although there may be *no direct evidence of collusion* for the purpose of obtaining a divorce, it is sufficient to vitiate the agreement *if it be so drawn, in order to an enjoyment of its benefits by one party or the other a decree must supervene.* And while in the case at bar there is no express agreement that the husband would not resist the application for a divorce, or that he would consent to a divorce, still the payments are made *dependent* upon the *"due making and entry of an interlocutory decree of divorce",* and

upon the "*due making and entry of a final decree of divorce.*" (Subd. 1 of the contract.)

In Neddo v. Neddo, 44 Pac. 2, the Supreme Court of Kansas, speaking through its Chief Justice, said:

> "A contract which incites, by the hope of financial profit, the separation of married people, should not be enforced."

As has been so frequently pointed out by the courts, there are three parties to every action for a divorce. Although upon its face a controversy between the parties of record only, it is in fact a triangular suit *sui generis,* the government occupying the position of a third party without counsel, it being the duty of the court to protect its interests (14 Cyc. 577). Hence, any agreement between husband and wife based upon a promise or understanding to institute an action to dissolve the marriage relation, would be against public policy and void.

The answer in the case at bar denies that the agreement set forth has been or now is in full force and effect (lines 2 and 3, amended answer, page 2). A void agreement is at no time in full force or effect, and

> "courts will esteem it their duty to interfere *upon their own motion,* whenever it appears that dissolution is sought to be effected by the connivance or collusion of the parties. * * * Whenever a void contract is relied on, no matter what the form of the motion in which it is presented, the court will disregard it".
>
> Loveren v. Loveren, 106 Cal. 510.

We submit that no decision of the California courts can be found to controvert the rules of law laid down in the foregoing cases; and, of course, the California law would be controlling in the present case. Under the authorities the agreement of December 1, 1913, was wholly void as being against public policy, for the reason that it was contingent upon and in aid of obtaining a divorce, and was only to be effective in the event the defendant in error should obtain a divorce. (Pereira v. Pereira, 156 Cal. 1; Newman v. Freitas, 129 Cal. 289.)

The only provision for alimony is found in the interlocutory decree of divorce, which does not in any way refer to the agreement in question, nor is it based thereon. This decree contains the following clause:

> "It is further ordered, adjudged and decreed that the custody of the children of plaintiff and defendant, to-wit: Marie Spreckels, Adolph Spreckels and John D. Spreckels, III, be and the same is hereby awarded to plaintiff. That the defendant pay to plaintiff for her support during her life the sum of ten (10) dollars per month; that defendant pay to plaintiff for the maintenance of each of said children the sum of one hundred (100) dollars per month during the minority of said children and pay to plaintiff as attorney's fees herein the sum of fifteen hundred dollars."

The present action is not brought upon this decree, but upon the original agreement between the parties, which we contend, is merged into the decree.

A CONTRACT FOR ALIMONY IS MERGED INTO AND SUPERSEDED BY THE SUBSEQUENT INTERLOCUTORY DECREE OF DIVORCE CONTAINING A PROVISION FOR ALIMONY.

Barnett v. Barnett, 50 Pac. 340;
Walker v. Walker, 50 N. E. 68 (Ind.);
Patton v. Loughbridge, 49 Ia. 218;
Barnes v. Barnes, 76 S. E. 52 (Ga.);
Schultz v. Christopher, 118 Pac. 630 (Wash.);
Ras. v. Ras, 35 Pac. 806 (Kan.).

In Olsen v. Superior Court, 165 Pac. 707, the court said:

> "Under our divorce laws the interlocutory decree fixes the right of the blameless spouse to a decree of divorce as and of the time when the interlocutory decree itself is given. Barring the familiar equitable considerations of fraud or mistake in the procurement of this decree, all matters therein litigated have passed beyond the possibility of future litigation."

Such an agreement as the one in question, if it is to have any effect or force whatever, must be subjected to *the examination of the divorce court,* and derive its sanction *from a decree of that court* with full knowledge of all the facts.

Loveren v. Loveren, 106 Cal. 513;
Daggett v. Daggett, 5 Paige 509;
France v. France, 79 App. Div. 291; N. Y. Supp. 579.

In such a case the divorce court may use its own discretion with respect of the agreement. It may ignore it altogether; or it may grant even greater alimony than is therein provided; or, it may, if it

deem the agreement unfair, or collusive, set it aside entirely and exercise its own discretion as to a proper sum to require a husband to pay a wife (Wallace v. Wallace, 67 At. 582).

THE INTERLOCUTORY DECREE ALONE, AND NOT THE FINAL DECREE, FIXES THE QUESTION OF ALIMONY, AND BY THE FINAL DECREE NO NEW ISSUES CAN BE PRESENTED, OR NEW PROPERTY RIGHTS ACQUIRED.

In the present case the court did not in its final decree, alter the agreement or base any judgment thereon. It simply referred to it incidentally. Concededly, it was not before the court as a part of the trial, for, as pointed out, the interlocutory decree is not based thereon, and the final decree could not alter or change the award in the interlocutory decree, nor does it attempt to do so.

In the case of Reed v. Reed, 9 Cal. App. 753, the court said:

> "In *John v. Superior Court,* 5 Cal. App. 262, the same views are in effect expressed in regard to the interlocutory decree. There the court said: 'Section 132 gives the court the power of its own motion to enter a final judgment at the expiration of one year from the entry of the interlocutory judgment; and the fact that this authority is given the court would seem to exclude the idea that a trial was contemplated at the time of entering the last judgment. * * * The decision of the court, both as to the granting of the divorce and the disposition of the property, is subject to review on appeal; and certainly it was never intended that there should be a delay

> of a year, and possibly of a longer period, in case of an appeal from the interlocutory judgment, and then another trial as to issues involving the property rights of the parties, followed by the delay of another appeal from the decision thereon and judgment disposing of the same.' (See, also, *Barron v. Barron* (Cal.), 96 Pac. 273; *Grannis v. Superior Court,* 146 Cal. 245; *Claudius v. Melvin,* 146 Cal. 257.) The court said in the latter case: 'The judgment entered on September 4, 1903, therefore, constituted a valid interlocutory judgment, declaring the plaintiff entitled to a divorce. As such it was subject to be vacated on appeal or on motion for a new trial, or by proceedings under section 473 of the Code of Civil Procedure. The time for all these proceedings having expired, and no such proceeding to vacate it having been instituted, the court thereupon lost all power *by any proceeding in the case to modify or vacate the judgment so far as it constituted an interlocutory judgment.*' "

In Bancroft v. Bancroft, 178 Cal. 368, the Supreme Court said:

> "It is well settled that an interlocutory decree of divorce is only subject to attack in the proceedings in which it is entered upon appeal, or by proceedings under section 473 of the Code of Civil Procedure, within six months after the entry of such decree, and that after the expiration of the period within which either of these forms of attack may be made, the trial court is without jurisdiction to *alter or set aside its interlocutory decree.* (Claudius v. Melvin, 146 Cal. 257; Suttman v. Superior Court, 174 Cal. 243; Newell v. Superior Court, 27 Cal. App. 343; Reed v. Reed, 9 Cal. App. 748.)"

And, also, bearing upon this point, we call the attention of the court to the case of Claudius v. Melvin, 146 Cal. 257, quoted in Reed, v. Reed (supra).

No case can be found where the final decree contains broader provisions than the interlocutory decree, which fixes the rights of the parties. The award of alimony in the case at bar is not based in any manner upon the agreement. The agreement is left unaffected by any action of the court, and indeed, a void agreement cannot be validated by any reference of the court in a final decree. The final decree does no more than make complete and final the interlocutory decree, and leaves the validity of the agreement and its provisions wholly undetermined.

If the reference to the agreement in the final decree is of any effect at all, then it clearly follows that the jurisdiction to determine the rights of the parties hereto would vest in the Superior Court and not in the federal court; such right having been expressly reserved; for the final decree says:

> " * * * by consent of the parties hereto the court hereby reserves the right to hereafter determine all matters in regard to the existing rights of the parties hereto".

It will be noticed, however, that the interlocutory decree, which alone can fix the question of alimony, contains no mention of any agreement, the final decree, as shown, does not establish property rights, and the mere incidental reference to an agreement does not alter or modify the interlocutory decree;

neither does it vitalize the agreement, but expressly declines to affect it.

We again wish to call the attention of the court to the fact that this agreement was made *in advance* of the commencement of the divorce proceedings.

In Palmer v. Palmer, 61 L. R. A. 647, the Supreme Court of Utah passed upon an agreement which recited: "Whereas, a divorce proceeding is in contemplation and will be instituted, * * * and said Palmer is willing to make a satisfactory settlement in lieu of all claims for alimony"; and it held:

> "The agreement, therefore, being one calculated or intended to facilitate the securing of a divorce is contrary to public policy."

Inasmuch as all of the promises of one party to the agreement were consideration for all of the promises of the other, and the agreement was based upon the procurement of a divorce, the illegal part of it is not separable, and the whole of it is void.

Dated, San Francisco,
May 8, 1922.

Respectfully submitted,
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BERT SCHLESINGER,
Counsel for Plaintiff in Error.

No. 3832

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN D. SPRECKELS, as special administrator of the estate of John D. Spreckels, Jr., deceased,

Plaintiff in Error,

vs.

EDITH H. WAKEFIELD,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JAMES F. PECK,
CHARLES W. BYRNES,
Attorneys for Defendant in Error.

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OCT 20 1922
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The contract alleged in the complaint is not against public policy. It was not collusive. Collusion must appear from the face of the contract in the light of the circumstances surrounding it. The parties to the contract had been separated and estranged for about a year before the contract was made. (Record p. 66.)

The recitals in the contract show that Mrs. Wakefield had already resolved on divorce proceedings and had employed an attorney to that end. The

contract recited that the motive of the contract was in these words:

> "Said parties desire to avoid the expense of litigation over any and all questions as to their respective property rights, including the rights of the second party to temporary and permanent alimony, and also desire to avoid any controversy over the care, custody and maintenance of the minor children of said parties." (Record p. 14.)

The trial court found that the contract was free from collusion. (Record p. 33.) And the court found that the reason stated in the contract for making the contract was the real moving cause thereof. (Record p. 33.) In the divorce action the court recited in its findings of the proceedings before it that all the allegations of the complaint therein were true and they were sustained by testimony free from all legal exceptions as to its competency, admissibility and sufficiency, and that all the allegations of the defendant's answer in the divorce action were untrue. (Record p. 35.) This must be taken as the equivalent of proof that at the time the contract was made a valid undisputed ground of divorce existed in favor of the plaintiff.

That which is authorized by statute can not be against public policy. The statutes of California on the subject of divorce is contained in the Civil Code, Secs. 90 to 107. The grounds for which a divorce will be granted are stated in Sec. 92 of the Code to be: adultery, extreme cruelty, wilful desertion, wilful neglect, habitual intemperance, conviction of

felony. If any of these grounds exist, the state, by its laws, has signified its consent to a dissolution of the marital relation.

Assuming the grounds of divorce to exist, the state has no policy to be served by a continuance of the marital relation. That is the reason for the statute.

The way in which the parties husband or wife will conduct themselves toward one another after a cause of action for divorce exists is not of concern to the state. The right to divorce by the innocent party can be availed of to dissolve the marriage bonds or the innocent party can forbear or condone. But whatever the choice made by the innocent party, the law does not seek to influence it. This of course assumes one innocent party, with an entire absence of fraud upon the rights of society by the parties. Where a party has an unqualified right to divorce on the grounds, say of adultery, an agreement between the two parties that the innocent party shall avail herself of the right the law gives her cannot be against public policy. To hold that such an agreement is against public policy is to condemn the law itself. Such an agreement would be futile but would not be against public policy. Such an agreement might be evidence of collusion, and should be closely scanned. It is not, however, conclusive evidence of collusion as the appellant in this action argues. If, when scanned, the court is convinced of the good faith of the transaction and its freedom from fraud the contract should not be declared invalid. The agreement standing fair is

not against public policy. There is no public policy that demands closing of the door of inquiry as to whether there has been actual collusion in the making of the agreement, or which would bar the parties from purging the agreement of any implication of collusion. The authorities hereinafter cited fully sustain the foregoing reasoning. It will be observed that this agreement assumes throughout a ground of divorce existed at the time of the agreement.

There is nothing whatever in the division of property of the spouses between them that is against public policy. Civil Code, Secs. 158-159. By the express provision of the statute the spouses could make any settlement and provision for support upon a contemplated separation, then why not in case of a contemplated divorce? The separation, so far as the statute limits it, may be for an indefinite period and may be for life. The disruption of the marital relations occurs in case of a separation as it does in case of divorce. What is the difference to society whether spouses are separated for life or divorced? Why should any inhibition exist on the contract in the case of divorce, which by the express provision of the statute does not exist in the case of a separation, however long continued? In the one case the subject is to be investigated and decided by the court, in the other not. This difference furnishes the ground for the rule against collusion. The court must be protected from fraud or collusion between the parties. This means actual fraud and actual collusion, and not imputed fraud

or imputed collusion. It is only where such division of property is an inducement to an actually collusive arrangement for divorce that public policy is violated. Having the two features, agreement that an innocent party will avail herself of the right given by the statute, where an unquestioned right to divorce exists under the statute, and a division of the property to follow the exercise of the right given by the statute, the arrangement can not be against public policy.

The rule is announced in 2 L. R. A. 708, in note to *Edleson v. Edleson,* as follows:

> "There seems to be no presumption that a contract for the settlement of property rights, made in contemplation of a possible divorce, is necessarily collusive, but the court will look to all the facts and circumstances of the case to determine whether the contract has that effect in each particular case. (Doose v. Doose, (1916) 198 Ill. App. 387; Martin v. Martin, (1884) 65 Iowa 255, 21 N. W. 595; Rapp. v. Rapp, (1912) 162 Mo. App. 673, 145 S. W. 114; Hudson v. Hudson, (1914) 176 Mo. App. 69, 162 S. W. 1062; Daggett v. Daggett, (1835) 5 Paige (N. Y.) 509, 28 Am. Dec. 442; Doeme v. Doeme, (1904) 96 App. Div. 284, 89 N. Y. Supp. 215; Wilhelmi v. Wilhelmi, (1899) 9 Pa. Dist. R. 685.)"

The note last quoted from was a most comprehensive one on the subject of collusion, with many cases reviewed.

In *Nelson on Divorce and Separation,* Sec. 509, he states the rule as follows:

> "The parties may make a valid agreement concerning alimony or division of their prop-

> erty. And such agreement is not void because entered into before suit was commenced or made in anticipation of a suit for divorce. Such agreement must be confined strictly to alimony, or a division of the property. If the agreement contains a stipulation concerning the suppression or misrepresentation of the real facts, or the nature of the agreement is such that the husband has an active interest in assisting the wife and in foregoing resistance, the agreement is collusive and void because contrary to public policy."

The contract in this case is not void on its face. It did not require Mrs. Spreckels to bring a suit for divorce. It did not require Mr. Spreckels to bring suit for divorce. It did not waive any defense that Mrs. Spreckels had in the event that Mr. Spreckels brought the action. It did not waive any defense that Mr. Spreckels had in the event that Mrs. Spreckels brought the action. It did not agree to any course of conduct by either party with relation to a suit for divorce, if one were brought.

The contract provided a *time,* to be determined by an event, upon the happening of which the sums would be paid. The face of the contract is consistent with the fact that the divorce proceedings were to be vigorously contested. There is no admission of a cause of divorce on the face of the contract. In fact, taking the contract for the inducements that it offers on its face, it was an inducement to Mr. Spreckels to defeat the procuring of a divorce by Mrs. Spreckels. On its face, Mrs. Spreckels, by the instrument itself, conveyed to Mr.

Spreckels all interest in the community property and all interests in his separate property *in praesenti.* It was executed when delivered as to those parties. If he should then defeat the divorce proceedings and prevent a decree in Mrs. Spreckels' favor, the rights under the instrument of Mrs. Spreckels would be defeated, and the benefits of the instrument would have been received by Mr. Spreckels without the burdens of the provisions of the instrument.

All the facts surrounding the making of the agreement make it even more certain that no collusion or fraud was contemplated or was practiced upon the court in the divorce proceedings. The instrument was before the court, as shown by the final decree. (Record pp. 36, 63.) The facts alleged as cause for the divorce were denied by the verified answer of Mr. Spreckels. (Record p. 57.) The issue was clearly made. There was a trial, as recited in the decree, on the 22nd day of August, 1914, and

> "It was proven to the satisfaction of the court, and the court found that all of the allegations of the said complaint were true, and that they were sustained by testimony free from all legal exceptions as to its competency, admissibility and sufficiency." (Record p. 60.)

In the allegation in the answer it is alleged that there was a trial of the issues at which the counsel for the respective parties were present. (Record p. 26.) The answer then suggests binding efficacy of the judgment of divorce, and not facts of fraud or collusion that render it invalid.

Some authorities hold that the contract would be valid if made when the divorce action was pending and would be invalid if made prior to the commencement of the action. It is difficult to understand the reason for this distinction, as the court may be imposed upon equally by collusive agreement before or after the suit is commenced.

Plaintiff in error contends that all proceedings for property settlement upon the condition of a divorce being obtained by one or the other of the parties, was always illegal, and states that no case could be found to the contrary.

I take it that neither of these circumstances make a contract collusive which is not so in fact, and do not prove one collusive which is not so in fact. These things alluded to by plaintiff in error are evidentiary facts only and are in no sense conclusively collusive.

The author of the note to the case of *Pierce v. Cobb,* 161 N. C. 300; L. R. A. 44 N. S., announces the rule in the following:

> "Hence it is well settled by unanimous decision that any contract intended or calculated to facilitate the obtaining of a divorce, or to promote the dissolution of the marriage relation, is void as against public policy. This does not mean, however, that every contract that depends for its effectiveness or enforcement upon the granting of a divorce in the future must necessarily be void, although that fact might, and probably would, serve to arouse suspicion, and to induce a rigid scrutiny of its real intent and effect. But the courts will examine

each contract upon its own merits, and subject it to the test that it must not either in intent or effect facilitate the procurement of a divorce. It seems that contract may be entered into in good faith in order to settle property rights, and may be valid and enforceable, although made to depend for effectiveness upon the event of a divorce in the future, provided that neither party is thereby induced to bring divorce proceedings or dissuaded from contesting the same. In other words, there seems to be no binding, conclusive presumption that every contract for the settlement of property rights made in contemplation of a possible divorce necessarily facilitates such divorce, but the court looks to all the facts and circumstances of the case in order to determine whether it does have that effect in that particular case."

Spalding v. Spalding, 184 Ill. App. 217:

In this case there was a pending suit for divorce between Mr. Spalding and Mrs. Spalding. Mrs. Spalding was the daughter of White. Mr. White made a contract with Mrs. Spalding whereby he promised, if she would forego a controversy in the divorce for alimony and would come to his home and keep house for him, he would give her ten thousand dollars, *if the divorce was granted.* This contract was held to be valid.

Pryor v. Pryor, 114 S. W. 700:

In this case proceeding for divorce was pending and an agreement was made between the husband and wife, and it was provided that a lien should be

created on the property of the husband in favor of the wife:

> "And it shall also be specified in any decree of divorce that may be rendered in the cause aforesaid that the performance of the agreement of the said James F. Pryor, as aforesaid, shall be a charge and a lien upon the property aforesaid."

In answering the contention that this contemplated contract that the wife would procure a divorce in order that the provisions could be effective, the Supreme Court of Arkansas stated:

> "Husband and wife may, when separation has taken place, or is to take place immediately, contract with each other for the payment by the husband of money to her for her support." (Citing cases.)

> "A decree of divorce granted subsequently does not annul the contract. Why, then, should not they be permitted to contract for the payment of alimony in contemplation of an immediate divorce? It violates no rule of public policy, for the husband is liable for the wife's support during the continuance of the marriage relation, and it is within the power of the court to grant alimony after the relation is dissolved."

Hammerstein v. Equitable Trust Co., 141 N. Y. S. 1065; also reported in 156 App. Dic. 644:

A trust was created. Hammerstein and his wife had been living separately when the trust was made. It was made after the commencement of the divorce action, and "It was to take effect only in case the plaintiff should succeed in obtaining a final judg-

ment *severing the bonds of matrimony*". See page 1070. Of such an agreement the court says:

> "Such an agreement, openly made and submitted to the court, is not against the policy of the law, but is in conformity with the general rule which favors ending litigation by agreement where possible."

This case was affirmed in 209 N. Y. 429.

Werner v. Werner, 153 App. Div. 719; 138 N. Y. S. 633:

In this case an agreement provided that the plaintiff would pay "in the event of the plaintiff obtaining the final decree against the defendant, the sum of $2,080; which should be in full of all counsel fees, costs, disbursements, and charges of every nature and kind whatsoever". This was held to be a valid contract. The parties were living apart and divorce proceedings had commenced and were pending.

Amspoker v. Amspoker, 155 N. W. 602:

In this case the parties made a settlement of their property rights before suit for divorce, after the separation. The husband promised to pay the wife's doctor bills, hospital bills, and costs of suit by her for a divorce and an attorney's fee for prosecuting it. In addition he agreed to pay her for support and maintenance $3000.00, in monthly payments of $50.00 each. She sued to enforce the agreement. The defense was made that the contract

was void as facilitating a divorce in violation of public policy. The court says:

> "On the part of plaintiff there was no occasion for collusion. The evidence shows beyond question that the parties were not living together as man and wife when the contract was executed, that plaintiff then had more than one legal ground for a divorce, that she was entitled to reasonable alimony, that marital relations were never resumed, and that a divorce was promptly granted to her. Under such circumstances the law in the states of this country, with one or two exceptions, is that reasonable agreements confined to the adjustment of property rights are binding on the parties and may be enforced by the courts. Cases announcing this rule and giving the reasons on which it rests are collected in a note in 12 L. R. A. (N. S.) 848, Hill v. Hill, 74 N. H. 288, 67 Atl. 406, 124 Am. St. Rep. 966.
>
> It is argued, nevertheless, that the contract, in requiring defendant to pay the costs of a divorce suit and an attorney's fee for prosecuting it, indicates collusion and an unlawful purpose to facilitate the procuring of a divorce. This position is untenable for the following reasons: Plaintiff's right to a divorce on legal grounds was free from doubt. Her right to reasonable alimony was equally clear. A court, upon a proper showing, would have required defendant to pay the costs of a divorce suit and the fee of an attorney for prosecuting it. In mutually settling property rights during a permanent separation, defendant lawfully assumed such burdens. The contract did not require plaintiff to commence a suit for a divorce, and, if brought, defendant was left free to make a defense. The circumstances surrounding the transactions and the language used in the written instrument do not require a construction

> which would invalidate the contract. It follows that the trial court did not err in refusing to cancel it on these grounds."

In the case at bar, as in this last cited case, there was nothing that required either party to bring a suit for divorce or to waive any defense. This case very consistently puts the fact of collusion as the test of invalidity of contract, and not circumstances which may or may not prove collusion and only gives weight to circumstances as evidence in determining the fact of collusion.

Stoff v. Erken, 25 Cal. App. 528:

In this case the trial had proceeded and some evidence was in. It was agreed that further evidence would not be introduced. It was further agreed that Mrs. Erken was to get the decree of divorce. The agreement disposed of the property interests. The court held the agreement to be valid; this was held because of the fact that the evidence was conclusive against the offending party. Rehearing was denied in the Supreme Court.

The conclusiveness of the testimony in the case at bar is recited in the judgment in *Spreckels v. Spreckels*, and brings this case squarely within the principle announced in *Stoff v. Erken.*

In all of these cases it will be observed that the judgment of divorce was to follow the agreement and in some manner the payment was to be made in the event that the judgment of divorce was entered. In some of them the contract was made after

the divorce suit was commenced; in others it was not.

We are unable to see wherein an agreement made before the suit is commenced is conclusive of the fact of collusion, whereas the same agreement, after the suit is commenced, is not evidence of the same weight.

The California cases announce no different ruling from that stated by the compiler of the note reported in the 44 L. R. A., infra.

The California cases upon the subject are as follows:

Beard v. Beard, 65 Cal. 354;
Loveren v. Loveren, 106 Cal. 509;
Newman v. Freitas, 129 Cal. 285;
Pereira v. Pereira, 156 Cal. 1;
Estate of Yoell, 164 Cal. 548;
Bowden v. Bowden, 175 Cal. 711.

In the case of *Beard v. Beard,* 65 Cal. 354, the agreement was admittedly collusive. The consideration for four notes was "abandoning her defense in an action for divorce then pending between them, and doing nothing to resist, or prevent, or delay him in obtaining a decree of divorce therein". The court stated, in the course of its opinion that

> "this agreement was a fraud on the court, and in contravention of the policy of the law". (p. 355.)

Loveren v. Loveren, 106 Cal. 509:

This was a suit commenced for divorce. The question arose in the divorce proceedings as to the

validity of an agreement made between the husband and wife before the divorce proceedings were commenced. The agreement purported to dispose of the property rights. The consideration for the agreement was the destruction of evidence contained in letters and photographs of letters, and the court found that

> "It was agreed by and between the parties to the action, as a part consideration therefor, that they were to entirely settle the whole cause and causes of action set forth in the complaint and cross-complaint herein; that defendant would withdraw his defense and his allegations against plaintiff; that plaintiff would withdraw all her charges against defendant except the charge of desertion; and that defendant would make no defense and permit the charge of desertion to be proven by plaintiff unchallenged."

Newman v. Freitas, 129 Cal. 285.

This was a case on a contract made between an attorney for the wife in contemplated divorce proceeding, and the wife. The attorney was to be compensated by a certain percentage of the recovery of the property of the husband in the divorce proceedings.

In *Pereira v. Pereira,* 156 Cal. 1, where a case for divorce was pending, an agreement was made between husband and wife to become reconciled and the suit was dismissed. The agreement provided for offenses that might thereafter be committed by the husband, and it provided that if he did commit any offense against the marital relation that the full amount of his wife's recovery against him

should be $10,000.00 It was held to be the purpose here to provide security against his own offenses by a sum which was inadequate compared with the value of his estate, and for that reason the agreement was held to invite infractions "thereafter" of the marital relations. The contract was held to be invalid because of that feature.

In *Bowden v. Bowden,* 175 Cal. 713, it is said of *Loveren v. Loveren,* and *Pereira v. Pereira,* that the agreements were in the nature of a collusive arrangement based upon the division of the community property, under which it was to be made easy for one of the spouses to secure a divorce from the other, and it was there said that *Newman v. Freitas* was of the same nature.

The *Estate of Yoell,* 164 Cal. 540, presented a discussion upon subjects more or less related.

It will be observed that in California there is no case where a contract has been declared invalid, where such contract was for the payment of alimony or distribution of property, when made between husband and wife in contemplation of a divorce proceeding thereafter to be had, where there was no collusive agreement to perpetrate a fraud upon the court. That is to say, there is no case in California where an agreement which would have been valid if made after suit was commenced was declared invalid because made before suit was commenced; or that was declared invalid because the payment was provided to be made in the event that

the decree of divorce was rendered in a particular way.

Again we call attention to the fact that the payment very properly commenced with the obtaining of the divorce in the plaintiff's favor. If it had commenced any sooner or if it was to be made regardless of whether Mrs. Spreckels secured a decree, a double obligation would have been on Mr. Spreckels; first, the obligation of the contract, and, second, by the obligation that is created by the marital relation itself. To hold that such a contract is invalid is practically to hold that no contract can be made settling property rights before the divorce is granted.

A review of the authorities cited by plaintiff in error, leads to the same conclusion. The language must be limited by the facts.

Birch v. Anthony, 109 Ga. 379; 77 Am. St. Rep. 379:

Contract signed by wife "relinquishes all claims" as wife, provided a decree was granted to husband by the first day of April, 1895. No divorce was had. The contract would therefore by its own terms seem terminated. However, the court discussed the public policy of the contract.

Adams v. Adams, 25 Minn. 72:

The contract was made between husband and wife. Notes for the payment of money were executed by the husband.

> "At the time the agreement was entered into the parties were still husband and wife."

It contemplated the fact that divorce proceedings had already been or were about to be instituted by the plaintiff against the defendant for the purpose of procuring a dissolution of their marital relations. The wife agreed to receive the notes,

> "in lieu of and in full alimony in said divorce case".

The agreement further provided that said notes and other property so placed in escrow were,

> "to be delivered to her when she shall have procured a decree of divorce, fixing a date, provided the husband *produced no appearance or answer in the case*".

The agreement was never brought to the attention of the court. The court commented upon the provision of the contract requiring that the husband should not appear or answer in the case, as strong evidence of collusion. The contract was not held void, but case was sent back for retrial on the issue of actual collusion.

Emersen v. Emersen, 120 Md. 584; 877 Atl. 1033:

Three of the judges dissented from the conclusion of the court. The question did not arise as to the validity of the agreement. The question arose as to the right to modify the final judgment in a divorce proceeding as to the alimony provision therein. The three dissenting judges held that the validity of the contract was not involved.

Delbridge v. Beach, 68 Wash. 416; 119 Pac. Rep. 856:

The court states the case as follows:

> "It is patent that the employment (of an attorney by the wife to defend suit against the husband) contemplated coercing the husband into a division of his separate property so as to secure to the wife 'the largest possible share' therein. The charge is that, if this could be accomplished in no other way, a divorce suit was to be instituted, having for its object a division of the husband's property. * * * *Nor is it alleged that the wife had any ground for divorce."* (Italics ours.)

The suit was on this contract between the wife and the attorney.

Davis v. Hinman, 103 N. W. 668:

In this case

> "an agreement was entered into between them (husband and wife) that in consideration of the assignment of this contract and the transfer to her husband of a span of horses, he would abandon his defense and allow her to take a decree for divorce."

Kissler v. Kissler, 141 Wis. 491; 124 N. W. 1028:

The court said:

> "While there is no direct agreement on defendant's part to abstain from defending the divorce action, it is very evident that the object and purpose of the agreement was that plaintiff should diligently prosecute her suit for divorce and receive $300.00 for so doing."

Barngrove v. Pettigrew, 128 Iowa, 523; 104 N. W. 904:

Certain attorneys, having heard that a wife intended commencing suit for divorce against her husband, made a certain agreement with the husband by which the attorneys undertook

> "to furnish proof on the trial of the said cause, of the plaintiff's infidelity"

to the husband, and to

> "secure him a divorce from his wife on his cross-complaint to be filed in said suit."

A specific sum was promised to be paid for the services. Suit was brought by attorneys against the husband, and it was held that the contract was void. The reason given being that the contract was an interference of strangers with the marital relation and was contingent upon the success of the attorneys.

It would be a manifest fraud upon the parties to this contract and also upon the court that granted the divorce, if the plaintiff should be denied the benefit of the contract, after she had by the contract surrendered and released every right that the law gave her. If the agreement had been carried into the decree it could not have been disturbed. Yet in that instance the public policy would have remained the same.

Julier v. Julier, 56 N. E. 661.

In the instant case the final decree provided:

> "It is further ordered, adjudged, and decreed that this judgment shall not effect, or be con-

> strued to effect, an existing agreement by and between the parties to this action, made and entered into by them on the 1st day of December, 1913."

This is clear evidence that the contract was before the court in the divorce proceeding, and that it was sanctioned by the court, because the court protected the contract against the very claim here made, that it was merged in the judgment.

If it be the right of the court to protect the marital relation, by granting alimony to the innocent wife and compelling its payment by the guilty husband, then a rule which asserts the invalidity of a contract to that end, after divorce at the instance of the offender gives a premium and prize to the wrongdoer where the contract is executed *in praesenti* by the innocent party. There is after divorce, no marital relation to protect, it has been dissolved, and, as in this case, without fraud upon the court. There is sufficient consideration to support the contract in this case without the provision as to time of payment stipulated. In a case very similar in principle, where the consideration was severable, such a contract was upheld.

McCahan v. McCahan, 31 Cal. App. Div. 1107.

The Civil Code of the State of California, at Section 1599, provides:

> "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."

In the case at bar, the time fixed for performance is not unlawful. It is claimed that it fixes a date of payment, which date could never arrive unless there was a divorce proceeding, and this too where the parties had been living apart for more than one year, and where the court in its decree finds that the evidence fully justified the divorce.

If there had been no divorce granted, the contract based upon a valid consideration would have been valid as to the defendant's obligation to pay, the condition only would be declared invalid. And particularly would this rule find full operation, in a case like this, where the alternative would lead to hardship, injustice and oppression. By the contract a present transfer of rights and property was made by plaintiff to defendant. The Civil Code of the State of California, at Section 1441, provides:

> "A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the article on the object of contracts, or which is repugnant to the nature of the interest created by the contract is void."

So in this case, if the condition fixing the time of payment, contemplated something unlawful, the contract being sufficient without it, would be upheld by disregarding the provision fixing the date after which payments would be made.

The logic of plaintiffs in error's contention is to declare all contracts for settlement of property rights before divorce invalid. On the theory that in every divorce proceeding the State is interested

as a party to preserve the marriage relation. The State is in no manner bound by the recitals or terms of the contract and can introduce evidence regardless of the terms to prove collusion. Regardless of the terms of the contract, oral evidence could be introduced in every case of settlement of property rights, to the effect that the settlement when made contemplated a divorce proceeding. Then any contract, according to plaintiff in error would fail. This is tantamount to holding that no executory contract of settlement can be made preceding a divorce and enforced after divorce. If all mention of divorce had been omitted from the agreement in the case at bar, the facts being as there recited, the objection of plaintiff in error would be equally pertinent. The proof could have been made at the trial of this case. The argument and reason assigned by plaintiff in error does not stop short of condemning all contracts of property settlement, as to promises left executory until after divorce.

The rule destroying contracts made in contemplation of divorce is based upon some substantial foundation. The philosophy underlying it is an actual fraud upon the court, rather than an abstract conception of possible danger that the contract may cloak a collusive agreement. Before the contract will be held invalid, because of being a menace to the marital relation, the contract must be made while the marriage relation is unbroken and must contemplate a fraud upon the court. If marriage relation is already broken by separation

for wrongs constituting a cause for divorce, then there is no marital relation which the law is solicitous to protect, and it provides laws of divorce to complete the severance, and deems that public policy. If, however, before the break in the marital relations or at the time of marriage or before marriage, or at the time of re-establishing the relation after condonation, provision is made which tempts to the destruction of the marital relation, then such a contract, because of its possible influence to disturb what would probably be or might be a happy union, is placed under the ban.

The other class of contracts under the ban are those that tend to a fraud upon the court (and the State) by agreeing to withhold the facts upon the trial, such as agreements not to appear, or not to defend, and which show a collusive arrangement.

In cases, however, where there is already a separation, for a year, as in this case, and the parties make such a contract as was made in this case, it cannot be declared invalid without granting that all settlements contemplating a divorce are invalid whether the evidence is on the face of the contract or not.

There are no doubt cases, here and there, to the contrary of what is here said, being the expression of judges of unusual religious fervor—who view the marital relation and divorce almost entirely from an ecclesiastical standpoint. The rule an-

nounced by such judges, still has the atmosphere of its religious origin.

Barlee v. Barlee, 1 Add. Eccl. 301;
Mortimer v. Mortimer, 2 Hagg. Cons. 310;
Nash v. Nash, 1 Hagg. Cons. 140;
Smith v. Smith, 2 Hagg. Eccl. Supp., Note A.

Still the weight of well considered authority sustains the text writer first quoted in this brief. The rule as so limited by the authority referred to is beneficial. An unqualified rule, such as is contended for by plaintiff in error would be bad policy and entirely out of harmony with the present conception of marriage and divorce, and the rights of contracting by spouses. There is nothing in the California cases to the contrary of what is here contended for by defendant in error, if the language of the opinion is considered with reference to the facts before the court.

> "Before a court should declare a contract not malum in se opposed to sound public policy, it must be entirely satisfied that the public will be substantially benefited, and that such advantage is not merely theoretical or problematical."
>
> *Cox v. Hughes,* 10 Cal. App. 563.

> "Whether or not a contract in any given case is contrary to public policy, is a question of law to be determined from the circumstances of each particular case."
>
> *Spangenberg v. Spangenberg,* 19 Cal. App. 439.

THE INTERLOCUTORY DECREE OF DIVORCE IS NOT RES ADJUDICATA AS TO ANY RIGHTS CREATED BY THE CONTRACT.

The answer of the defendant has what is termed a further defense, wherein the defendant sets up the issues in the divorce proceeding and the judgment therein, and states that the contract was "superseded and merged" in the judgment. (Record p. 27.) There was no express claim of *res judicata.* "Superseded and merged" and *res judicata* are not the same thing. Intention of parties is important or controlling in merger, *res judicata* is independent of the intention of the parties to the action if a trial has been had on the issue. We call attention to the fact that plaintiff in error omits the force of the last provision in the contract. This last provision, in the absence of other proof, is conclusive that the judgment was not on the merits as to the alimony, and therefore not *res judicata,* and showing a contrary intention, could not be a merger. The provision in the contract reads as follows:

> "That the provisions of this agreement shall not be modified or abrogated by any interlocutory decree or final decree of divorce in favor of the second party which may be hereafter made and entered." (Record p. 49.)

In the absence of further showing, this is an agreement between the parties that the issue of property rights and alimony was not to be and was not submitted to the court for its determination, but that such issue was expressly withheld from the court.

As further evidence of that fact we have the statement by the court in the final decree of divorce to the same effect. This, the court recites, was by consent of the parties. (Record p. 63.) This evidence in contract and decree is conclusive proof that the question of property and alimony was not submitted to the courts on the merits of the rights of the parties. The further fact that, despite the provisions of the decree, Mr. Spreckels paid three hundred and fifty dollars a month until April 15, 1915, is evidence that he so regarded the effect of the decree.

Section 1911 of the Code of Civil Procedure of the State of California, reads:

> "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

In *Oakland v. Oakland Water Front Company,* 118 Cal. 220, it is stated:

> "The form of the judgment is immaterial, but unless it appears from the record that it was given upon a consideration of the merits of the controversy, or if it affirmatively appears that the merits were not considered, it is not available as an estoppel."

Where parties stipulate or reserve questions from the court's consideration, the question is not *res adjudicata. Miller & Lux v. James,* 57 Cal. Dec. 265; 179 Pac. 175. It is there stated:

> "The reservations and provisos in favor of the parties neither add to nor detract from this

> fundamental fact, and the issue having thus been withdrawn by consent, the decision of the court cannot be held to be an adjudication upon the very issue so withdrawn."

The rights created by the contract were not marital rights or obligations; they grew out of the contract, not out of the marriage. The consideration for the contractual obligations were the conveyance of rights to community property and other rights. Being contractual obligations, they could be enforced like any other contractual obligation. The decree of divorce and the issues in the divorce proceeding in no way contemplates a settlement of the contractual rights of husband and wife. These are as independent of the marital relation and the marital obligation as are the contracts of third parties with either. A divorce proceeding therefore does not attempt to adjudicate all the contractual relations of husband and wife. The contract in this instance was no more a subject of adjudication in the divorce proceedings than would be a promissory note given by the husband to the wife have been. This rule is not changed because of the fact that the consideration for the contract was a waiver of certain marital obligations. That question only goes to the sufficiency of the consideration for the contract. If that consideration be valid, and the contract therefore effective the courts, in divorce proceedings, would not have to do with the adjudication of such rights or obligations of such contracts. The divorce court may, if it sees fit, recite the contract as a substitute for the per-

formance that would otherwise devolve upon it, but in no sense would it be compelled to do so, and in no sense would there be an adjudication upon the subject of the contractual obligation.

The only question here, therefore, is, was the contract valid? If valid, then the question of *res adjudicata* has nothing to do with the case. If the contract was valid and the court had attempted to change or modify it in the divorce proceeding, it has been held that such action by the court would have been beyond the court's jurisdiction. See last paragraph in *McCahan v. McCahan,* Cal. App. Dec., volume 31, page 111, where it is stated:

> "It is manifest that in so far as it (the decree) deals with the property rights of the parties, the contract is a valid agreement *with which the court cannot interfere."* (Italics ours.)
>
> *Galusha v. Galusha,* 22 N. E. 1114 (Court of Appeals, New York).

A contract providing for maintenance and support of the wife was modified in the divorce proceeding. The fact that the agreement stood upon consideration growing out of a marital obligation was fully discussed, and it was there held that the separate agreement was not affected by the decree granting the absolute divorce. In this case the court stated:

> "The plaintiff did not in her complaint ask, as a part of the relief, that the separation agreement be set aside. She did not allege that it had been obtained fraudulently, or by

> means of duress. In no way whatever was its validity attacked, or a foundation laid which would have empowered a court of equity to set it aside. The subsequent order of the general term, therefore, in directing such modification of the judgment of divorce as would terminate the force and legal effect of this valid separation agreement, cannot be sustained.
> * * * * * * *
>
> The law looks favorably upon and encourages settlements made outside of court, between parties to a controversy."

The judgment appealed from in this last named case was

> "modified by striking out the provision determining the force and effect of the separation agreement."

This case is very instructive upon the relation of the contract to the divorce proceedings.

See, also,

Levy v. Levy, 144 App. Div. 561;

Lawrence v. Lawrence, 64 N. Y. S. 113;

Nelson v. Vassenden, 115 Minn. 1, 131 N. W. 794.

In the last cited case the contract made between husband and wife was sought to be set aside upon the ground that it was not carried into the decree of divorce. It was held that the contract stood upon its own foundation and whether recited in the decree or not, that its absence from the decree was not *res adjudicata* against it. See paragraph 2. It is there stated:

> "The plaintiff, relying on this agreement and at the request of her husband. * * *

> consented to the omission of this provision from the decree for alimony. If this agreement were to be held void, it would therefore result in one of the very impositions the court seeks to prevent by its scrutiny of settlements between parties in divorce proceedings. Unquestionably it is better practice to submit such agreements to the court and obtain their incorporation in the decree. The party claiming the benefit of such an agreement is thereby relieved from the very serious burden of establishing that the agreement was free from fraud or imposition, and made without collusion, to facilitate the granting of the divorce."

As the action in the instant case could not be prosecuted unless the contract alleged had been made, and as this contract furnishes the primary right upon which the cause of action is predicated, it is hardly necessary to further distinguish cases where no contract whatever existed. There was no contract whatever in the following cases:

Schultz v. Christopher, 118 Pac. 630;
Roe v. Roe, 35 Pac. 880;
Barnett v. Barnett, 50 Pac. 337;
Walker v. Walker, 50 N. E. 68.

The case of *Raines v. Raines,* 76 S. E. 52 (Ga.), was a suit to enjoin the execution of a judgment for alimony. The wife had agreed, in consideration of property, not to insist upon further alimony. The agreement was oral. It was not a suit upon the contract, nor did it involve a contract. The court stated, in denying relief against execution, that the agreement could not be taken advantage of in the proceeding. The court did not hold that the suit

could not have been brought upon the contract, if violated, to recover such damages as might be inflicted by this violation. It merely held that the final decree having been entered the same would be enforced as entered. Whatever breaches of contract would thereby occur would be left to other proceedings in other actions on the contract.

It will be observed that the property rights, the subject of *Barnett v. Barnett,* were those "growing out of the marital relation". See fourth syllabus.

It affirmatively appears that the contract was before the court in the divorce proceeding (R. 63). Plaintiff in error answers this by questioning the jurisdiction of the court to make the statement and provision found in last paragraph of the final decree. This power of the court has been several times adjudicated.

Remley v. Remley, 33 Cal. App. Dec. 304;
Gould v. Superior Court, 60 Cal. Dec. 5;
Estate of Dargee, 162 Cal. 51.

The contract was not invalid, and was not merged into the judgment in the action for divorce, nor was the judgment in the action for divorce *res judicata* as to any fact necessary to the recovery by defendant in error in this case.

We respectfully contend that the judgment appealed from should be affirmed.

Dated, San Francisco,
October 18, 1922.

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